143-305

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~353~~. 48

THE HORN SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED APRIL 18, 1888.

We submit that this means that a legal interruption of the debt *ex pais* is as effective as a judgment of revival, to continue the life of a mortgage affecting third persons. A judgment of revival could only be had between the parties to the original record or their representatives. A third possessor is not a proper party to such suit. This was decided in *Chapman* vs. *Nelson*, 31 La. Ann., 343, already cited in my brief. By analogy, the interruption must grow out of the acts of parties to the original suit, and when the interruption thereby takes place, it continues the debt as valid against anybody who is collaterally affected. There is nothing to show any acts by Mrs. Warfield interrupting the prescription of the debt, and consequently no reliance can be had upon that ground to sustain the judgment of the court below.

If the argument as to interruption of prescription is valid under the laws of Louisiana, it is remarkable that it should not be noticed by the supreme court of that State in this case, for if it had any foundation at all it must at once suggest itself. Neither the district court nor the supreme court of Louisiana, it will be observed, says anything on that subject.

WM. H. TAFT,
Of Counsel.

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a Court of Appeals, State of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
against
THE HORN SILVER MINING COMPANY, Appellant.

Papers on Appeal from Judgment.

Hon. Denis O'Brien, attorney general for plaintiffs, respondents, Albany, New York.

Davies, Cole & Rapallo, attorneys for defendant, appellant, 32 Nassau St., New York.

1 Supreme Court. General Term, First Department.

THE PEOPLE OF THE STATE OF NEW YORK
against
HORN SILVER MINING COMPANY.

Preliminary Statement.

This action was commenced by the service of the summons and complaint on the 26th day of June, 1883.

The answer was served on the 3d day of August, 1883.

There has been no change in the parties to the action.

Messrs. Davies, Cole & Rapallo have been substituted as attorneys for the defendant.

2 *Summons.*

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE HORN SILVER MINING COMPANY, Defendant.

Trial Desired in Albany County.
Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated June 23, 1883.

LESLIE W. RUSSELL,
Attorney General, Plaintiffs' Attorney.

Office and post-office address, New Capitol, Albany, N. Y.

1—353

3 *Complaint.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against.
THE HORN SILVER MINING COMPANY, Defendant. } Complaint.

The plaintiffs, by Leslie W. Russell, their attorney general, for complaint against the above-named defendant, allege:

1. That the defendant above named is a corporation, duly incorporated and organized under the laws of the Territory of Utah and doing business in this State and liable to be taxed on its corporate franchise or business under the provisions of section three of the act, chapter five hundred and forty-two of the laws of this State of the year 1880, as amended by chapter three hundred and sixty-one of the laws of 1881; and said defendant is not one of either of the classes of corporations, namely, "savings banks and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State," excepted from the operation of said section by the provisions thereof.

2. That on or about the second day of December, 1881, pursuant to the provisions of section first of the statute aforesaid, as amended, the treasurer of said defendant did make report in writing to the comptroller of this State, stating specifically the amount of
4 capital of said corporation paid in, the date, amount, and rate per centum of each and every dividend declared by said corporation during the year ending with the first day of November, 1881, of which report a copy is hereto annexed, marked Exhibit "A," and made a part of this complaint.

3. That the dividend or dividends made or declared by said corporation during the year ending with the first day of November, 1881, did not amount to six per centum upon the par value of its capital stock, as plaintiffs are informed and believe and allege on information and belief, and as appears by said report.

4. Plaintiffs further allege, on information and belief, that the secretary and treasurer of said corporation, after having been duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, did, on or about the second day of December, 1881, estimate and appraise the capital stock of said corporation, upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at the sum of five million dollars, the same being its actual value in cash and not less than the average price which said stock sold for during said year; and thereupon they did forthwith forward to the comptroller of this State a certificate of said estimate and appraisal, accompanied by a copy of their said oath or affirmation by them signed and duly attested pursuant to the provisions of the statutes aforesaid, a copy whereof is included in Exhibit "A," hereto annexed and made a part of this complaint.

5. That the amount of State tax for the year ending with said first day of November, 1881, imposed upon the defendant by the statute aforesaid is the sum of seven thousand and five hundred dollars, the same being at the rate of one and one-half mills upon each dollar of the valuation of the said capital stock made, as aforesaid, in accordance with the provisions of the first section of said statute and the amendments thereto.

6. That by the provisions of the statutes aforesaid it became and was the duty of the treasurer or other officer having charge of said corporation to transmit the amount of said tax to the treasury of this State within fifteen days from the first day of January, 1882, but the said amount of State tax has not nor has any part thereof been transmitted to the treasury of this State.

7. That by reason of the premises the said defendant is indebted to the plaintiffs in the said sum of seven thousand five hundred dollars, the amount of said tax, with interest thereon from the sixteenth day of January, 1882.

8. That by reason of the premises the said defendant became and is indebted to the plaintiffs in the sum of fifteen hundred dollars, said sum being a penalty of twenty per centum on said unpaid taxes for the two years for which said taxes have remained unpaid, which by the second section of said act as amended the defendant became and is liable to pay to these plaintiffs in addition to said taxes.

II. For a second and further cause of action the plaintiffs, by Leslie W. Russell, their attorney general, for complaint against the above-named defendant, allege:

1. That the defendant above named is and for more than one year previous to the first day of November, 1882, was a corporation, duly incorporated and organized under the laws of the Territory of Utah and doing business in this State, and liable to be taxed on its corporate franchises or business under the provisions of section three of the act, chapter five hundred and forty-two of the laws of this State of the year 1880, as amended by chapter three hundred and sixty-one of the laws of 1881; and said defendant is not one of either of the classes of corporations, namely, "savings banks and institutions for savings, life insurance companies, banks, and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State," excepted from the operation of said section by the provisions thereof.

2. That on or about the nineteenth day of December, 1882, pursuant to the provisions of section first of the statute aforesaid as amended, the treasurer of said defendant did make report in writing to the comptroller of this State, stating specifically the amount of capital of said corporation paid in, the date, amount and rate per centum of each and every dividend declared by said corporation during the year ending with the first day of November, 1882, of which report a copy is hereto annexed, marked Exhibit "B," and made a part of this complaint.

3. That the dividends made or declared by the defendant during the year ending with the first day of November, 1882, amounted, as the plaintiffs are informed and believe, and allege on informa-

tion and belief, and as appears by said report, to more than six per centum upon the par value of its capital stock, to wit, to twelve per centum upon the par value of its capital stock.

4. That the amount of State tax for the year ending with said first day of November, 1882, imposed upon the defendant by the statutes aforesaid as amended, is the sum of thirty thousand dollars, the same being at the rate of one-quarter mill upon said defendant's capital stock for each one per centum of dividend made or declared as aforesaid.

5. That by the provisions of the statute aforesaid as amended it became and was the duty of the treasurer or other officer having charge of said corporation to transmit the amount of said
7 tax to the treasury of this State within fifteen days from the first day of January, 1883, but the said amount of State tax has not nor has any part thereof been transmitted to the treasury of this State.

6. That by reason of the premises the said defendant is indebted to the plaintiffs in the said sum of thirty thousand dollars, the amount of said tax, with interest thereon from the sixteenth day of January, 1883.

7. That by reason of the premises the said defendant became and is indebted to the plaintiffs in the sum of three thousand dollars, said sum being a penalty of ten per centum on said unpaid taxes, which, by the second section of said act as amended, the defendant became and is liable to pay to these plaintiffs, in addition to said taxes for the year 1882.

Wherefore the plaintiffs demand judgment against said defendant for said sum of thirty-seven thousand five hundred dollars, with interest on seven thousand five hundred dollars thereof from the 16th day of January, 1882, and on thirty thousand dollars thereof from the 16th day of January, 1883, State tax as aforesaid, and for said sums of four thousand five hundred dollars, penalties as aforesaid, together with the costs of this action.

LESLIE W. RUSSELL,
Attorney General, Plaintiffs' Attorney.

STATE OF NEW YORK,
City and County of Albany, } ss.:

Ira Davenport, being duly sworn, deposes and says that he is comptroller of the State of New York and is acquainted with the facts stated in the foregoing complaint; that said complaint is true to his own knowledge except as to the matters therein stated
8 to be alleged on information and belief, and as to those matters he believes it to be true.

IRA DAVENPORT.

Sworn to before me this 25th day of June, 1883.

WILLIS E. MERRIMAN,
Notary Public.

"A."

(Page 1.)

(Return this to comptroller.)

(Form of report for year in which any dividend has been declared. Both pages of this blank are to be used in all cases where no dividend has been declared and where the dividends declared do not amount to six per cent. on the whole capital stock. Where the dividends are equal to or greater than six per cent. the first page of this blank, when properly filled, will be a sufficient report.)

Report of the Horn Silver Mining Co., of Frisco, Utah, organized under the laws of Utah Territory, for the year ending the first day of November, A. D. 1881.

Office of the Horn Silver Mining Company.

(Give post-office address of company.)

44 Wall St., N. Y.

NOVEMBER, 1881.

To the comptroller of the State of New York:

Agreeably to law, as treasurer of the above company, I make the following report, viz:

Total authorized capital of company, $10,000,000.

Whole number of shares of stock authorized, 400,000.

Number of shares of stock issued, 400,000.

Par value of each share, $25.

9 Amount paid into the treasury of the company on each share, $—.

Amount of capital paid in, $—.

Amount of capital upon which dividends were declared, $10,000,000.

Date of dividend declared, November 15th, 1881.

Amount of dividend declared, $300,000.

Rate per cent. per annum of dividends, three per cent. (3%).

Amount of profit added to sinking fund, $—.

WM. F. VAN PELT, *Treasurer.*

STATE OF NEW YORK, }
County of New York, } *ss:*

On this second day of December, A. D. 1881, personally appeared before me, a notary public in and for the county of New York, William F. Van Pelt, treasurer of the Horn Silver Mining Company, who, being duly sworn according to law, did depose and say that the foregoing report is just and true, according as the accounts stand in the books of the company, and that it includes all dividends, whether in cash, stock, scrip, or of any other character or description, declared by said company during the year ending on the first day of November, A. D. 1882, and that the amount of profit added to the sinking fund of this company during the said year, without a division thereof amongst its stockholders, was $—, as above stated.

WM. F. VAN PELT, *Treasurer.*

Sworn to and subscribed before me the day and year aforesaid.
SIDNEY WHITTEMORE,
Notary Public.

10 "A."

(Report and appraisement for year in which no dividend or a dividend of less than six per cent. has been declared, as shown by the first page of this report.)

Report and Appraisement of the Horn Silver Mining Company for the Year Ending the First Day of November, 1881.

STATE OF NEW YORK, }
County of New York, } *ss:*

On this second day of December, A. D. 1881, before me, the subscriber, a notary public in and for the county of New York, personally appeared William F. Van Pelt, treasurer, and W. S. Hoyt, secretary, of the Horn Silver Mining Company, who, being by me severally duly sworn, did say that the amount of capital paid in of said company is —, and that said company declared no dividend in cash, stock, scrip, or of any other character or description during the year ending the first day of November, 1881, save the dividends heren reported, and that they will with fidelity, according to the best of their knowledge and belief, estimate and appraise the capital stock of said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year and not less than the price or value as indicated or measured by the amount of the dividends made or declared during the year, and that the amount of profit added to the sinking fund of this company during the said year, without a division thereof amongst its stockholders, was $—.

WM. F. VAN PELT, *Treasurer.*
W. S. HOYT, *Secretary.*

Sworn — and subscribed before me the day and year aforesaid.
SIDNEY WHITTEMORE,
Notary Public.

11 Office of the Horn Silver Mining Company.

(Give post-office address of company.)

NOVEMBER, 1881.

We, the undersigned, being the treasurer and secretary of the Horn Silver Mining Company, do certify that, in pursuance of our aforesaid oaths, we have estimated and appraised the capital stock of said company at its actual value in cash as follows, viz: 400,000 shares at twelve dollars and fifty cents per share, amounting in the whole to five million dollars.

In witness whereof we have hereunto set our hands the day and year aforesaid.

WM. F. VAN PELT, *Treasurer.*
W. S. HOYT, *Secretary.*

The foregoing report of the Horn Silver Mining Company of Frisco, Utah, and the foregoing appraisement of its capital stock are made under protest, and the said company does not acknowledge, but denies, its liability to be taxed under the provisions of either of chapter 542 of the laws of 1880 or of chapter 361 of the laws of 1881.

Dated New York, Dec. 1, 1881.

HORN SILVER MINING COMPANY
OF FRISCO, UTAH,
By W. S. HOYT, *Secretary.*

"B."

(Page 1.)

(Return this to comptroller.)

12 (Form of report for year in which any dividend has been declared. Both pages of this blank are to be used in all cases where no dividend has been declared and where the dividends declared do not amount to six per cent. on the whole capital stock. Where the dividends are equal to or greater than six per cent. the first page of this blank, when properly filled, will be a sufficient report.)

Report of the Horn Silver Mining Company for the Year Ending the First Day of November, A. D. 1882.

Office of the Horn Silver Mining Company.

(Give post-office address of company.)

44 Wall St., New York.

NOVEMBER 14TH, 1882.

To the comptroller of the State of New York:

Agreeably to law, as treasurer of the above company, I make the following report, viz:

Total authorized capital of company, $10,000,000.

Whole number of shares of stock authorized, 400,000.

Number of shares of stock issued, 400,000.

Par value of each share, $25.

Amount paid into the treasury of the company on each share, $—.

Amount of capital paid in, $—.

Stock of corporation was issued for real estate at the time of the formation thereof to the amount of $10,000,000.

Amount of capital upon which dividends were declared, $10,000,000.

Date of each dividend declared ..... Nov. 15, 1881. Feb. 15, 1882. May 15, 1882. Aug. 15, 1882.

Amount of each dividend declared, $300,000.

Rate per cent. per annum of dividends, 12.

Amount of profit added to sinking fund, $ nothing.

WM. F. VAN PELT, *Treasurer.*

STATE OF NEW YORK, }
County of New York, } ss:

On this 19th day of December, A. D. 1882, personally appeared before me, a notary public in and for the county of New
13 York, Wm. F. Van Pelt, treasurer of the Horn Silver Mining Company, who being duly sworn according to law, did depose and say that the foregoing report is just and true, according as the accounts stand in the books of the company, and that it includes all dividends, whether in cash, stock, scrip, or of any other character or description, declared by said company during the year ending on the first day of November, A. D. 1882, and that the amount of profit added to the sinking fund of this company during the said year without a division thereof amongst its stockholders was nothing, as above stated.

WM. F. VAN PELT, *Treasurer.*

Sworn to and subscribed before me the day and year aforesaid.

SAM'L B. BENN,
Notary Public, N. Y. Co.

The foregoing report is made by the Horn Silver Mining Company under protest, denying its liability to be taxed under chapter 361, Laws of 1881, as amended by chap. 151, Laws of 1882, and denying that it is the duty of its president or treasurer to make this or any report under the said act, and the said company hereby protests against any assessment upon it for the purpose of taxation under said act and protests against the imposition upon it of any tax under said act, and denies that it is the duty of any of its officers to pay or transmit any tax to the treasurer of the State that may be imposed upon it under said act.

The above protest is made on the grounds that the said company either is a manufacturing corporation carrying on manufacture within this State or is a foreign corporation having no part of its property, capital, or capital stock situated or employed in business within this State.

Dated New York, December 19, 1882.

W. S. HOYT, *Secretary.*

14 *Answer.*

Supreme Court, State of New York, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK }
against } Answer.
THE HORN SILVER MINING COMPANY. }

The defendant, by Davies, Work, McNamee & Hilton, its attorneys, answering the complaint herein, respectfully shows to this court, upon information and belief—

A.

By way of defense to the first alleged cause of action herein.

I. For a first, separate, and distinct defense to the first alleged cause of action herein the defendant—

1. Denies each and every allegation contained in paragraph one of said complaint, wherein is alleged said first cause of action, except the allegation, "That the defendant above named is a corporation duly incorporated and organized under the laws of the Territory of Utah," and alleges that it is and was at all times during the year ending November 1st, 1881, a manufacturing corporation carrying on manufacture within this State, and is and was at all times aforesaid excepted from the operation of the section and statute in said paragraph named.

2. Admits each and every allegation contained in paragraph two of the said complaint alleging said first cause of action, and further alleges that the said report in said paragraph named was made under and accompanied by a protest, of which the protest indorsed upon the copy of the certificate of estimate and appraisal annexed to the complaint herein and marked Exhibit A is a copy, and the defendant hereby refers to said protest and by such reference makes the same a part of his answer herein.

3. Admits each and every allegation contained in paragraph three of said complaint alleging said cause of action.

4. Admits each and every allegation contained in paragraph four of said complaint alleging said first cause of action, and further alleges that the said certificate of said estimate and appraisal in said paragraph named was made under and accompanied by a protest, of which the protest endorsed upon the copy of the certificate of estimate and appraisal annexed to the complaint herein and marked Exhibit A is a copy, and the defendant hereby refers to said protest and by such reference makes the same a part of his answer herein.

5. Denies each and every allegation contained in paragraph five of the said complaint alleging said first cause of action.

6. Denies each and every allegation contained in paragraph six of the said complaint alleging said first cause of action, except that it admits that the sum of seven thousand and five hundred dollars or any part thereof has not been transmitted to the treasury of this State as the amount of tax claimed in the said cause of action.

7. Denies each and every allegation contained in paragraph seven of the said complaint alleging said cause of action.

8. Denies each and every allegation contained in paragraph eight of the said complaint alleging said cause of action.

II. For a second, separate, and distinct defense to the first alleged cause of action herein the defendant—

1. Repeats the allegations and denials contained in the first defense to the said cause of action, and by this reference makes the same a part of this defense to said cause of action.

2. Further alleges that it has not neglected or refused to pay the alleged tax sued for in said cause of action.

III. For a third, separate, and distinct defense to the first alleged cause of action herein the defendant—

I. Repeats the allegations and denials contained in the first defense to the said cause of action, and by this reference makes the same a part of this defense to said cause of action.

2. Further alleges that it is and at all times has been a manufacturing corporation organized, existing, and transacting its business under the laws of the State of Utah; that it has not had and has never exercised any franchises or powers acquired under the laws of this State.

3. Further alleges that its entire capital stock of $10,000,000 was issued in payment for real estate situated in the State of Utah and in the State of Illinois, and said real estate consists entirely of mining property and improvements thereon, and of a refinery.

4. Further alleges that during the year ending November 1st, 1881, this defendant carried on in the State of New York the business of manufacturing bars of silver sent here from the States
17 of Utah and Illinois into standard bars, and that said business constituted but a small portion of its entire business, and was the only business carried on by it during said year within the State of New York except a part of its financial business and correspondence.

5. Further alleges that its capital and its capital stock during said year ending November 1, 1881, was only partially employed within this State.

6. Further alleges that it paid taxes both in the States of Utah and of Illinois for the year 1881.

7. Further alleges, upon information and belief, that the statute in said complaint named, namely, Laws 1880, ch. 542, as amended by Laws 1881, ch. 361, and Laws 1882, ch. 151, is invalid and inoperative as to this defendant and imposes no legal obligation upon this defendant to pay any tax, because of the facts hereinbefore set forth and because it establishes an unjust and unequal system of taxation, in that it attempts to fix the amount of tax to be paid by the defendant wholly without regard to the extent of corporate franchises exercised by it within this State and without regard to the amount of business done by it within this State or the amount of capital employed within this State or the amount of property owned by it and situated within this State, and without regard to the amount of its capital stock held in this State, and without regard to the extent of the protection and benefits derived from the laws or agencies of this State, and because it seeks in effect to tax property and persons not within the jurisdiction of this State or in any way subject to its authority and violates the principles of equality and uniformity.

8. Further alleges, upon information and belief, that the statute in said complaint named, namely, Laws 1880, ch. 542, as amended by Laws 1881, ch. 361, and Laws 1882, ch. 151, is in violation of the constitution of the State of New York, never became
18 law, and is void, and that no tax is legally imposed upon this defendant thereby or can be collected from it thereunder.

IV. For a fourth, separate, and distinct defense to the first alleged cause of action herein the defendant—

1. Repeats the allegations and denials contained in paragraphs 1, 2, 3, 4, 5, 6, and 7 of the third defense herein, and by this reference makes the same a part of this defense to said cause of action.

2. Further alleges, upon information and belief, that the statute in said complaint named, namely, Laws 1880, ch. 542, as amended by Laws 1881, ch. 361, and Laws 1882, ch. 151, is invalid in so far as it attempts to impose upon defendant the tax herein sued for, in that it is in violation of and repugnant to the Constitution of the United States, and the authority attempted to be exercised under the State of New York and dependent upon the said statute is invalid in that it is in violation of and repugnant to the Constitution of the United States, and said statute never became law and is void, and no tax is legally imposed upon this defendant thereby or can be collected from it thereunder, and the particular grounds of said repugnance are that the taxation of defendant attempted by the said statute would take the private property of defendant for public use without just compensation, and would be a denial to this defendant by the State of New York of the equal protection of its laws and would be a deprivation by said State of the property of the defendant without due process of law, and would be a regulation of commerce among the several States, and would interfere with the sovereignty of the State of Utah, and would tax property and business without the jurisdiction of the State of New York.

3. Further alleges, upon information and belief, that under the titles, rights, privileges, and immunities which belong to the defendant under the Constitution of the United States, and which
19 it hereby specially sets up and claims, it is not subject to the assessment and taxation provided for by said statute, and said statute never became law and is void, and no tax is legally imposed upon this defendant thereby or can be collected from it thereunder.

V. For a separate and distinct but partial defense to the alleged first cause of action the defendant—

1. Repeats the allegations and denials contained in the first defense to the said cause of action, and by this reference makes the same a part of this defense to said cause of action.

2. Further alleges that it has not neglected or refused to pay the tax named in said cause of action.

3. Further alleges that the percentage of $1,500 in said cause of action named has not been assessed in the usual manner of assessing the taxes in said statute named.

4. Further alleges that at all times since the enactment of said statute there have been serious doubts as to its proper construction in the minds of the officers of this State charged with its execution, and that in the case of foreign corporations the comptroller of this State did in the year 1882 issue a circular in which he maintained a construction of the said statute contrary to the claims advanced by the plaintiff herein; that the proper construction of the said statute has been the subject of many litigations in the courts of this State, some of which are still pending and undetermined, and that

one — these litigations is now pending undetermined in the Supreme Court of the United States; that the proper officers of the State, prior to the commencement of this suit, waived the payment of any penalty for the non-payment of said taxes as and when they accrued; that said defendant has been at all times ready to pay any and all taxes which were legally charged against it.

20 B.

By way of defense to the second alleged cause of action herein.

I. For a first, separate, and distinct defense to the second alleged cause of action herein it—

1. Denies each and every allegation contained in paragraph one of said complaint wherein is alleged said cause of action, except the allegation "that the defendant above named is and for more than one year previous to the first day of November, 1882, was a corporation duly incorporated and organized under the laws of the Territory of Utah," and alleges that it is and was at all times during the year ending November 1st, 1881, a manufacturing corporation carrying on manufacture within this State, and is and was at all times aforesaid excepted from the operation of the section and statute in said paragraph named.

2. Admits each and every allegation contained in paragraph two of the said complaint alleging said second cause of action, and further alleges that the said report in said paragraph named was made under and accompanied by a protest of which the protest accompanying the copy of said report annexed to the complaint herein and marked Exhibit B is a copy, and the defendant hereby refers to said protest and by such reference makes the same a part of his answer herein.

3. Admits each and every allegation contained in paragraph three of the said cause of action.

4. Denies each and every allegation contained in paragraph four of said complaint alleging said second cause of action.

5. Denies each and every allegation contained in paragraph
21 five of said complaint alleging said cause of action, except that it admits that the sum of thirty thousand dollars or any part thereof has not been transmitted to the treasury of this State as the amount of tax claimed in said cause of action.

6. Denies each and every allegation contained in paragraph six of the said complaint alleging said cause of action.

7. Denies each and every allegation contained in paragraph seven of said complaint alleging said cause of action.

II. For a second, separate, and distinct defense to the second alleged cause of action herein the defendant—

1. Repeats the allegations and denials contained in the first defense to the said cause of action, and by this reference makes the same a part of this defense to said cause of action.

2. Further alleges that it has not neglected or refused to pay the alleged tax sued for in said cause of action.

III. For a third, separate, and distinct defense to the second alleged cause of action herein the defendant—

1. Repeats the allegations and denials contained in the first defense to the said alleged cause of action herein, and by this reference makes the same a part of this defense to said cause of action.

2. Repeats the allegations and denials contained in the third defense to the first alleged cause of action herein (except the allegations and denials contained in paragraphs 1 and 6 of said defense to said cause of action), and by this reference makes the same a part of this defense to said cause of action.

22 3. Further alleges that it paid taxes in the States of Utah and of Illinois for the year 1882.

IV. For a fourth, separate, and distinct defense to the second alleged cause of action herein the defendant—

1. Repeats the allegations and denials contained in the first defense to said cause of action, and by such reference makes the same a part of this defense to said cause of action.

2. Repeats the allegations and denials contained in the third defense to the first alleged cause of action herein (except the allegations and denials contained in paragraphs 1, 6, and 8 of said cause of action), and by this reference makes the same a part of this defense to said cause of action.

3. Further alleges that it paid taxes in the States of Utah and Illinois for the year 1882.

4. Repeats the allegations contained in paragraphs 2 and 3 of the fourth defense to the first alleged cause of action herein, and by this reference makes the same a part of this defense to said cause of action.

V. For a separate and distinct but partial defense to the alleged second cause of action the defendant—

1. Repeats the allegations and denials contained in the first defense to said cause of action, and by this reference makes the same a part of this defense to said cause of action.

2. Further alleges that it has not neglected or refused to pay the tax named in said cause of action.

3. Further alleges that the percentage of $3.000 in said cause of action named has not been assessed in the usual manner of assessing the taxes in said statute named.

23 4. Further alleges that a year has not elapsed since the alleged tax was payable, as is alleged.

5. Repeats the allegations contained in the fourth paragraph of the partial defense to the final alleged cause of action herein, and by this reference makes the same a part of this defense.

Wherefore the defendant demands that the said complaint may be dismissed with costs.

DAVIES, WORK, McNAMEE & HILTON,
Attorneys for Defendant, 2 *Wall Street*, *New York*.

CITY AND COUNTY OF NEW YORK, *ss*:

William S. Hoyt, being duly sworn, says that he is the secretary

of The Horn Silver Mining Company, defendant above named, and that the foregoing answer is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

W. S. HOYT.

Sworn to before me this 2d day of August, 1883.

EDW. J. HARDING,
Commissioner of Deeds, N. Y. City and Co.

24 *Order of Reference.*

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

On reading and filing the written consent and stipulation of the parties hereto, it is ordered that this cause and all the issues of law and of fact therein be, and the same hereby are, referred to Isaac Lawson, Esq., counsellor-at-law, to hear and determine.

(Copy.)

JOHN LARKIN, *Clerk.*

(Endorsed:) Take notice of an order of which the within is a copy, entered in Albany county clerk's office Nov. 8, 1883. Leslie W. Russell, pl'ffs' att'y.

25 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE HORN SILVER MINING COMPANY. — Requests for Findings of Fact and Rulings upon Questions of Law in Behalf of the Defendant.

The defendant submits to the referee herein the following statement of facts which it deems established by the evidence, and requests the referee to find the following propositions of fact as to the first alleged cause of action herein:

Propositions of Fact.

Found. J. L. 1. The defendant was during the year ending November 1st, 1881, a corporation duly incorporated and organized under the laws of the Territory of Utah.

Found. J. L. 2. The principal place of business of the defendant was fixed during the year ending November 1st, 1881, by its articles of incorporation at Frisco, Beaver county, Territory of Utah.

The said articles provide that offices for the registry and transfer of stock, for paying dividends, and for general financial purposes may be established at any place or places in the United States or Territories by the directors of the company.

Found. J. L.

3. The business for which the defendant was chartered during the year ending November 1st, 1881, was, as fixed by its articles, to conduct the business of mining in Grampion precinct, San Francisco mining district, Beaver county, Utah Territory, and the buying, selling, leasing, and operating mines and mining claims in the Territory of Utah and smelting, reduction, and refining works in said Territory or elsewhere, the conducting a general mining, milling, and smelting business in all its branches, including buying and selling mineral ores and bullion; the carrying on a general mercantile business by buying and selling such goods, merchandise, stores, and miners' supplies as are usually kept in and required by the wants of a mining camp or settlement; the building and operating all such roads, tramways, and transportation routes as may be convenient in transporting the products of its business or procuring supplies, purchasing, hiring, and holding all such real and personal property, wherever situate, as may be required in carrying on any of its business, and when no longer required for business purposes, leasing, selling, or exchanging the same, and generally to do all acts and things incidental to a general mining business or to any of the aforesaid pursuits; and the immediate purpose for which the defendant is primarily formed is for working and developing the estate, property, and premises known as the Horn silver mine and the treatment and reduction of the ores and metals therein contained.

26

Found excepted as to the words "substantially the whole or," and as to these refused. J. L.

4. The defendant during the year ending November 1st, 1881, did outside of the State of New York substantially the whole or the main corporate business which it was chartered to transact, and such business was as follows:

The annual meeting of the stockholders was held in Utah. The mine and general plant of the company was in Frisco, Beaver county, Utah, and there were smelting works at Frisco and Francklyn, Utah. The business in Utah consisted in mining the ore and manufacturing it into base bullion, and the manufacturing business in Utah was the principal business and was four times as great as the mining business. All the product of the mines was manufactured by the company into rough bullion bars in Utah. Fluxing ores were brought there. From 230 to 275 men were employed in Utah, and the pay-rolls amounted to from $16,000 to $18,000 per month. Supplies and freights were paid for there and large and frequent sales of ore and base bullion were made there. All correspondence in regard to financial and other transactions which took place in Utah was done by the manager there. At Utah all expenses were met to the extent of receipts. The expenses at Utah were about $2,500 per day for labor, ore, fuel, supplies, and processes. The plant in Utah consisted in part of five furnaces.

27

The business in Illinois during said year was as follows: The defendant had a refinery at Chicago, where the lead in the base bullion was separated from the silver, and the lead *were* all sold at Chicago.

The works consisted of various antimony furnaces and lead furnaces, retorts, blast furnaces, &c. The cost for zinc was $50 per day. The men which were employed at Chicago were paid there, the pay-rolls amounting to from $6,000 to $7,000 per month, and all the expenses, amounting to $1,000 per day, were met there by the manager, who used the moneys received by him there to pay
28 expenses. The manufacturing business done in Chicago made the total manufacturing business six times as great as the mining business.

Found. J. L. 5. The defendant's president, secretary, and treasurer had their offices in New York, and the directors had their annual meetings there during the year ending November 1st, 1881. The company did very little correspondence from its New York office. Receipts for silver delivered to assay office in New York city were sold in New York. The defendant deposited moneys in a bank in New York. Some money was temporarily loaned in New York and dividends were paid there and the stock was transferred there. The above constituted the only business done by defendant in New York during the year ending November 1st, 1881. The business carried on in New York constituted but a small portion of its entire business.

Found except as to the words "substantially the whole or," and as to those refused. J. L. 6. The defendant, during the year ending November 1st, 1881, did, in the Territory of Utah and State of Illinois, substantially the whole or main corporate business for which it was chartered, and exercised some control over such business by correspondence from New York.

Refused. J. L. 7. The defendant was, during the year ending November 1st, 1881, a manufacturing corporation carrying on manufacture within the State of New York.

Found except as to the words "manufacturing," and as to that refused. J. L. 8. The defendant, during the year ending November 1st, 1881, was a manufacturing corporation. Its manufacturing business was as follows:

The operations in Utah were as follows:

The ore was first mined at Frisco and was then carried by
29 rail to a point two hundred miles distant, where it was smelted. Fluxing ores were bought and coke from Pennsylvania, which was a very large expense. The expense of the manufacturing part of the business was four times as great as that of the mining business, and it was the principal part of the business. Almost twice as many men were employed in manufacturing as were employed in mining. The process was similar to that of iron blast furnaces. Furnaces consisted of fire-stacks similar to iron blast furnaces. They were thirty feet high and had a receptacle fourteen feet deep to hold the charge.

The process was as follows:

The ore and charge mixed, the latter consisting of iron ore, slag, and such composition ores as make the proper mixture. The daily expense of all the ingredients for the charge was from $1,000 to $1,500 per day. The whole charge was smelted and the lead and silver were run into bars weighing about 90 pounds each and are about 28 to 30 inches long. These bars are called base bullion and contain various impurities and have about 150 oz. of silver to the ton. The process takes about six hours. This base bullion was taken to Chicago.

The operations in Chicago were as follows:

In Chicago the silver and lead *was* separated and refined lead was made. The daily expenses at Chicago were twice as great as those of the mining business at Utah. Coke from Pennsylvania was bought at Chicago and was a very large expense. The process there was as follows:

The base bullion first is put into an antimony furnace, where
30 the impurities gradually come to the surface and are partially skimmed off. It is then put into the lead furnace with zinc, which is in amount about six per cent. of the charge, the expenses of which are about $50 per day, and then goes to the silver baths, and from there to the blast furnace, to the retorts and the test furnace, and undergoes other treatments. The process takes from 8 to 9 days. The result is refined lead and double refined lead or hard lead and base silver. The base silver is not as merchantable an article as refined silver. The base silver is all the way from 980 to 990 parts out of 1,000 fine.

Refused. J. L. 9. The defendant was a manufacturing corporation carrying on manufacture in the State of New York during the year ending November 1st, 1881, and such manufacture was as follows:

The process of refining the base silver and producing standard silver bars of 999 parts fineness is expensive, and different works are needed from those in Utah and Illinois. The manufacture of the silver bars was completed in New York. The base silver contains a very small percentage of lead, a little copper, some dross, and a little gold. The smelting works in Utah and Illinois are not adapted to separating the gold from the silver. The bars were delivered at the office of the company in the city of New York. They were then sent to the United States assay office, where all the dross and gold, copper, and lead *is* taken out and they are brought down to a fineness of 999. The company then sells the refined silver or standard bars. The market value of the base bullion bars is $1 per oz. and the total increase in value of the base bullion after
31 it has passed through the refining process in the U. S. assay office was ten per cent, which increases were divided between the defendants and the assay office, the defendants taking eight per cent. and the assay office taking two per cent.

Found. J. L. 10. On or about the 2d day of December, 1881, pursuant to the provisions of section 1 of the Laws of 1882, ch. 540, as amended by Laws of 1881, ch. 361, the treasurer of the said defendant made report in writing to the comptroller of

this State, stating specifically the amount of the capital of the said defendant corporation paid in, and the date, amount, and rate per centum of each and every dividend declared by the said corporation during the year ending with the 1st day of November, 1881, of which report Exhibit A, attached to the complaint herein, is a copy.

The material facts stated in said report are as follows:

Total authorized capital of company	$10,000,000
Whole number of shares of stock authorized	400,000
Number of shares of stock issued	400,000
Par value of each share	$25
Amount of capital upon which dividends were declared	$10,000,000

Date of dividend declared, November 15, 1881.

Amount of dividend declared	$300,000

Rate per cent. per annum of dividends, three per cent.

Found. J. L. 11. Said report was made under and accompanied by a protest, of which the protest endorsed upon the copy of the certificate of estimate and appraisement accompanying the said report annexed to the complaint herein, marked Exhibit A, is a copy, and which protest was as follows:

32

The foregoing report of the Horn Silver Mining Company of Frisco, Utah Ty., and the foregoing appraisement of its capital stock are made under protest, and the said company does not acknowledge, but denies its liability to be taxed under the provisions of either chapter 542 of the Laws of 1880 or of chapter 361 of the Laws of 1881.

Dated New York, December 1st, 1881.

HORN SILVER MINING COMPANY
OF FRISCO, UTAH TY.
W. S. HOYT, *Secretary.*

Found. J. L. 12. The dividends made or declared by the defendant during the year ending with the 1st day of November, 1881, did not amount to six per centum upon the par value of its capital stock, but amounted to only three per centum of the said par value.

Found. J. L. 13. The secretary and treasurer of the defendant, after having been duly sworn, or affirmed, to do and perform the same with fidelity, according to the best of their knowledge and belief, did, on or about the 2d day of December, 1881, estimate and appraise the capital stock of the defendant, upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, namely, to three per centum as aforesaid, at the sum of five million dollars, the same being its actual value in cash and not less than the average price which said stock sold for during said year, and thereupon they did forthwith forward to the comptroller of this State

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a certificate of said estimate and appraisement, accompanied by a copy of their said oath or affirmation by them signed and duly attested, pursuant to the provisions of the statutes aforesaid, a copy whereof is included in Exhibit A, attached to the complaint herein.

Found. J. L. 14. Said certificate of estimate and appraisement was made under and accompanied by a protest, of which the protest endorsed upon the copy of the certificate of estimate and appraisement annexed to the complaint herein and marked Exhibit A is a copy.

And which protest is as follows:

The foregoing report of the Horn Silver Mining Company of Frisco, Utah, and the foregoing appraisement of its capital stock are made under protest, and the said company does not acknowledge but denies its liability to be taxed under the provisions of either of chapter 542 of the Laws of 1880 or of chapter 361 of the Laws of 1881.

Dated New York, December 1st, 1881.

HORN SILVER MINING COMPANY
OF FRISCO, UTAH, TY.
W. S. HOYT, *Sec'y.*

Found. J. L. 15. The sum of $7,500 or any part thereof has not been transmitted to the treasurer of this State as the amount of the taxes claimed in the first cause of action alleged herein.

Refused. J. L. 16. The defendant did not neglect or 34 refuse to pay any tax required to be paid by the Laws of 1880, ch. 542, as amended by the Laws of 1881, ch. 361, within fifteen days after the first day of January, 1882, or at any time prior to the commencement of this action.

Found except as to the words "manufacturing," and as to that refused. J. L. 17. The defendant is and has been at all times a manufacturing corporation organized, existing, and transacting its business under the laws of the State of Utah, and has not had and has never exercised any franchises or powers acquired under the laws of the State of New York.

Found. J. L. 18. The entire capital stock of defendant, $10,000,000, was issued in payment for real estate situated in the Territory of Utah and in the State of Illinois, and said real estate consisted entirely of mining property and improvements therein and of a refinery.

Found. J. L. 19. The average amount of money in cash on hand deposit- in bank in the State of New York, belonging to the defendant, during the year ending November 1st, 1881, was $29,188.63, and the average amount of bullion within the State of New York during the said year was $26,641.99.

The average amount of money loaned within the State of New York during said year was $50,250.

The value of the office furniture within the State during said year was $500.

Found. J. L. 20. During the year ending November 1st, 1881, the defendant paid taxes in the States of Utah and Illinois on its property there situated.

Refused. J. L. 21. The percentage of $750 claimed was not assessed in the usual manner of assessing taxes in the said statutes named.

Refused. J. L. 22. At all times since the enactment of said statute there have been serious doubts as to its proper construction in the minds of the officers of the State of New York charged with its execution, and in the case of foreign corporations the comptroller of the State did, in the year 1882, issue a circular in which he maintained a construction of said statute contrary to the claims advanced in this action. The proper construction of the said statute has been the subject of many litigations in the courts of this State, some of which are still pending and undetermined, and two of these litigations are now pending undetermined in the Supreme Court of the United States.

Found. J. L. 22½. Taxes due under L. 1880, ch. 542, as amended by L. 1881, ch. 361, from foreign manufacturing corporations manufacturing without this State but doing a portion of their business in the State of New York during the year ending November 1st, 1881, were computed, settled, and adjusted upon a basis of the proportionate amount of their capital employed within this State.

Refused. J. L. 23. The proper officers of the State, prior to the commencement of this action, waived the payment of any penalty for the non-payment of the taxes claimed in the first cause of action herein as and when they accrued.

Refused. J. L. 24. The defendant has been at all times ready to pay any and all taxes which were legally chargeable against it by the State of New York.

Found, except so much as asks a finding of a waiver. J. L. 25. The comptroller of the State of New York has accepted reports from various corporations under Laws of 1880, ch. 542, as amended by Laws 1881, ch. 361, after the dates on which they became due, without the addition of ten per centum to the taxes of the said corporations, and has accepted taxes from various corporations under the Laws of 1880, ch. 542, as amended by Laws of 1881, ch. 361, after the dates on which they became due, without the addition of ten per centum to the said taxes, and has waived the said penalties in the cases of various corporations; and the defendant also submits to the referee herein the following rulings upon questions of law which it desires the referee to make as the first alleged cause of action herein:

Conclusions of Law.

Refused. J. L. 1. During the year ending November 1st, 1881, the defendant was not a foreign corporation doing business within the State of New York within the meaning of ch.

542, Laws 1880, as amended by ch. 361, Laws 1881, and was not during said year liable to be taxed under said statute.

If the referee refuses to find the first conclusion of law he is requested to find as follows:

Refused. J. L. 2. The defendant is and was at the times during the year ending November 1st, 1881, a manufacturing corporation carrying on manufacturing within the State of New York, and is and was at all times during the year ending November 1st, 1881, one of the classes of corporations excepted from the operation of section 3 of ch. 542 of the Laws of 1880, as amended by ch. 361 of the Laws of 1881, namely, a manufacturing corporation carrying on manufacture within the State of New York, and was not during the said year liable to be taxed under said statute.

37 If the referee refuses to find either of the above conclusions of law he is requested to find as follows:

Refused. J. L. 2½. The defendant was, during the year ending November 1st, 1881, a foreign manufacturing corporation, manufacturing without this State, but doing a portion of its business in this State.

Refused. J. L. 3. The defendant has not neglected or refused to pay any tax required to be paid by Laws 1880, ch. 542, as amended by Laws 1881, ch. 361, and no tax can be recovered in this action.

Refused. J. L. 4. Chapter 542, Laws 1880, as amended by Laws 1881, ch. 361, is invalid and inoperative as to this defendant and imposes no legal obligation upon this defendant to pay any tax, because it establishes an unjust and unequal system of taxation in that it attempts to fix the amount of tax to be paid by the defendant wholly without regard to the extent of corporate franchises exercised by it within the State of New York and without regard to the amount of business done by it within said State or the amount of capital employed within said State or the amount of property owned by it and situated within said State, and without regard to the amount of its capital stock held in this State and without regard to the extent of the protection and benefits derived from the laws or agencies of this State, and because it seeks in effect to tax property and persons not within the jurisdiction of this State or in any way subject to its authority, and violates all principles of equality and uniformity.

Refused. J. L. 5. Chapter 542, Laws 1880, as amended by Laws 1881, ch. 361, if in violation of the consti-

38 tution of the State of New York, never became law and is void, and no tax is legally imposed upon this defendant thereby or can be collected from it thereunder.

Refused. J. L. 6. Chapter 542, Laws 1880, as amended by Laws 1881, ch. 361, is invalid in so far as it attempts to impose upon defendant the tax herein sued for, in that it is in violation of and repugnant to the Constitution of the United States, and the authority attempted to be exercised under the State of New York and defendant upon the said statute is invalid in that it is in violation of and repugnant to the Constitution of the United

States and said statute never became law and is void, and no tax is legally imposed upon this defendant thereby or can be collected from it thereunder, and the particular grounds of said repugnance are that the taxation of defendant attempted by the said statute would take the private property of defendant for public use without just compensation, and would be a denial to this defendant by the State of New York of the equal protection of the laws, and would be a deprivation by said State of the property of the defendant without due process of law, and would be a regulation of commerce among the several States and would interfere with the sovereignty of the State of Utah, and would tax property and business without the jurisdiction of the State of New York.

Refused. J. L. 7. Under the titles, rights, privileges, and immunities which belong to the defendant under the Constitution of the United States, and which it specially sets up and claims, it is not subject to the assessment and taxa-
39 tion provided for in chapter 542, L. 1880, as amended by chapter 361, L. 1881, and said statute never became law and is void, and no tax is legally imposed upon this defendant thereby or can be collected from it thereunder.

Refused. J. L. 8. Defendant was, during the year ending November 1st, 1881, a foreign manufacturing corporation carrying on manufacture in the State of New York within the meaning of L. 1880, ch. 542, as amended by L. 1881, ch. 361, and if liable to be taxed under said acts to any extent, the amount of capital stock which is the basis for tax under the provisions of the Laws 1880, ch. 542, as amended by Laws 1881, ch. 361, is only that employed during said year within said State.

Refused. J. L. 9. During the year ending November 1st, 1881, the defendant had no capital employed within the State of New York within the meaning of said statutes.

Refused. J. L. 10. The complaint should be dismissed with costs. If the referee refuses to make the above rulings upon questions of law, then the defendant submits to the referee herein the following rulings upon questions of law which it desires the referee to make as to the first alleged cause of action herein.

Refused. J. L. 11. The capital of the defendant was, during the year ending November 1st, 1881, only partially employed within the State of New York within the meaning of L. 1880, ch. 542, as amended by L. 1881, ch. 361, and the amount of capital stock, which is the basis for tax under the provisions of L. 1880, ch. 542, as amended by L. 1881, ch. 361, is only that employed during said year within said State.

Refused. J. L. 40 12. The amount of capital stock employed by the defendant within the State of New York during the year ending November 1st, 1881, which is the basis of tax under the provisions of L. 1880, ch. 542, as amended by L. 1881, ch. 361, and L. 1882, ch. 151, is $106,580.79.

Refused. J. L. 13. The defendant did not neglect or refuse to pay any tax required to be paid by L. 1880, ch. 542, as amended by L. 1881, ch. 361, within fifteen days after the first day of January, 1882, and it never became the duty of the comptroller of the State of New York to add ten per cent. to the tax of the defendant and the defendant is not liable therefor.

Refused. J. L. 14. The defendant did not neglect or refuse to pay any tax required by L. 1880, ch. 542, as amended by L. 1881, ch. 361, to be paid at any time prior to the commencement of this action, and it never became the duty of the comptroller of the State of New York to add ten per cent. to the tax of the defendant and the defendant is not liable therefor.

Refused. J. L. 15. The percentage of $1,500 upon the amount of the tax claimed was not assessed in the usual manner of assessing the tax in L. 1880, ch. 542, as amended by L. 1881, ch. 361, and L. 1882, ch. 151, and the defendant is not liable therefor.

Refused. J. L. 16. The proper officers of the State of New York waived the payment of any percentage for the non-payment of tax claimed, and hence the defendant is not liable therefor.

Refused. J. L. 17. The plaintiff is entitled to recover from the defendant, if anything, only the sum of $159,817.

Refused. J. L. 41 The defendant submits to the referee herein the following statements of facts, which it deems it established by the evidence, and requests the referee to find the following propositions of fact as to the second clause of action alleged herein:

Propositions of Fact.

Found. J. L. First. The defendant is a corporation duly incorporated and organized under the laws of the Territory of Utah.

Found. J. L. Second. The principal place of business of the defendant as fixed during the year ending November 1st, 1884, by its articles of incorporation, — as stated in propositions of fact No. 2 of requests as to *find* alleged cause of action.

Found. J. L. Third. The business for which the defendant was chartered during the year ending November 1st, 1882, is as stated in proposition of fact No. 3 of requests as to first alleged cause of action.

Found except as to the words "substantially the whole or," and as to these refused. J. L. Fourth. The defendant did, during the year ending November 1st, 1882, outside of the State of New York, substantially the whole or the main corporate business which it was chartered to transact, and such business was as stated in proposition of fact No. 4 of requests as to first alleged cause of action.

Found. J. L. Fifth. Defendant did, during the year ending November 1st, 1882, within the State of New York, only the business stated in proposition of fact No. 5 of requests as to first alleged cause of action.

Found except the words "substantially the whole or," and as these refused. J. L. Sixth. Defendant did, during the year ending November 1st, 1882, substantially the whole or main corporate business for which it was chartered
42 — 1882, in the Territory of Utah and State of Illinois, and exercised some control over such business by correspondence from New York.

Refused. J. L. Seventh. The defendant was, during the year ending November 1st, 1882, a manufacturing corporation carrying on manufacture within this State.

Found except as to the word "manufacturing," and as to that refused. J. L. Eighth. The defendant was a manufacturing corporation and its manufacturing business was, during the year ending November 1st, 1882, as stated in proposition of fact No. 8 of requests as to first alleged cause of action.

Refused. J. L. Ninth. The defendant was a manufacturing corporation carrying on manufacture in the State of New York during the year ending November 1st, 1882, and such manufacture was as stated in proposition of fact No. 9 of requests as to first alleged cause of action.

Found. J. L. Tenth. On or about the 13th day of December, 1882, pursuant to the provisions of section 1st of the Laws of 1880, ch. 542, as amended by the Laws of 1881, ch. 361, the treasurer of the said defendant did make report in writing to the comptroller of this State stating specifically the amount of the capital of the said corporation paid in and the date, amount, and rate per centum of each and every dividend declared by the said corporation during the year ending the 1st day of November, 1882, of which report Exhibit B, attached to the complaint herein, is a copy.

Found. J. L. Eleventh. The material facts stated in the said report are as follows:

Total authorized capital of company	$10,000,000
Whole number of shares of stock authorized	400,000
43 Number of shares issued	400,000
Par value of each share	$25
Amount paid into the treasury of the company on each share, —.	Stock of corporation was issued for real estate at the time of the formation thereof to the am't of $10,000,000.
Amount of capital paid in, —.	
Amount of capital upon which dividends were declared	$10,000,000
Date of each dividend declared	November 15th, 1881. February 15th, 1882. May 15th, 1882. August 15th, 1882.
Amount of each dividend declared	$300,000
Rate per annum of dividends	.12

The said report was made under and accompanied by a protest, of which the protest annexed to said Exhibit B is a copy, and which protest is as follows:

The foregoing report is made by the Horn Silver Mining Company under protest, denying its liability to be taxed under chapter 361, Laws of 1881, as amended by chapter 151, Laws of 1882, and denying that it is the duty of its president or treasurer to make this or any report under the said act, and the said company hereby protests against any assessment upon it for the purpose of taxation under said act and protests against the imposition upon it of any tax under said act, and denies that it is the duty of any of its officers to pay or transmit any tax to the treasurer of the State that may be imposed upon it under said act.

The above protest is made on the grounds that the said company either is a manufacturing corporation carrying on manufacture within this State or is a foreign corporation having no part
44 of its property, capital, or capital stock situated or employed in business within this State.

Dated New York, December 1st, 1884.

W. S. HOYT, *Secretary.*

Found. J. L. Twelfth. The dividend made or declared by the defendant during the year ending the 1st day of November, 1882, amounted to more than six per centum of the par value of the capital stock of the defendant, to wit, to twelve per cent. upon the said par value.

Found. J. L. Thirteenth. The sum of thirty thousand dollars or any part thereof has not been transmitted to the treasurer of this State as the amount of taxes claimed in said second cause of action alleged herein.

Refused. J. L. Fourteenth. The defendant did not neglect or refuse to pay any taxes required to be paid by the Laws of 1881, ch. 361, and the Laws of 1882, ch. 151, within fifteen days after the first day of January, 1883, or at any time prior to the commencement of this action.

Found except as to the word "manufacturing," and as to that refused. J. L. Fifteenth. The defendant is and has been at all times a manufacturing corporation organized, existing, and transacting its business under the laws of the Territory of Utah, and has not had and has never exercised any franchises or powers acquired under the laws of the State of New York.

Found. J. L. Sixteenth. The entire capital stock of defendant, $10,000,000, was issued in payment for real estate situated in the Territory of Utah and in the State of Illinois, and said real estate consists entirely of mining property and improvements thereon, and of a refinery.

45 Seventeenth. The average amount of money in cash on hand in the State of New York belonging to the defendant during the year ending November 1st, 1882, was $40,345.65, and the average amount of bullion in the State of New York during the said year was $51,555.41. The average amount of money loaned

within the State of New York during the year ending 1882 was $287,407.14. The value of the office furniture within this State during the year 1882 was $500.

Found. J. L. Eighteenth. During the year ending November 1st, 1882, the defendant paid taxes in the Territory of Utah and State of Illinois on the property there situated.

Refused. J. L. Nineteenth. At all times since the enactment of said statute there has been serious doubts as to its proper construction in the minds of the officers of the State of New York charged with its execution, and in the case of foreign corporations the comptroller of this State did, in the year 1882, issue a circular, in which he maintained a construction of said statute contrary to the claims advanced in this action. The proper construction of the said statute has been the subject of many litigations in the courts of this State, some of which are still pending and undetermined, and two of these litigations are now pending and undetermined in the Supreme Court of the United States.

Found. J. L. Nineteen and one-half. Taxes due under L. 1880, ch. 542, as amended by L. 1881, ch. 361, and L. 1882, ch. 151, from foreign manufacturing corporations manufacturing without this State, but doing a portion of their business in the State of New York during the year ending No-
46 vember first, 1882, were computed, settled, and adjusted upon a basis of the proportionate amount of their capital employed within this State.

Refused. J. L. Twentieth. The proper officers of the State, prior to the commencement of this action, waived the payment of any penalty for the non-payment of the taxes claimed.

Refused. J. L. Twenty-first. The defendant has been at all times ready to pay any and all taxes which were legally chargeable against it by the State of New York.

Found, except so much as asks a finding of waiver. J. L. Twenty-second. The comptroller of the State of New York has accepted reports from various corporations under the Laws of 1880, ch. 542, as amended by Laws 1881, ch. 361, after the dates on which they became due, without the addition of ten per centum to the tax of the said corporations under the Laws of 1880, ch. 542, as amended by Laws of 1881, ch. 361, and Laws of 1882, ch. 151, after the days on which they became due, without the addition of ten per centum to the said taxes, and has waived the said penalties in the cases of various corporations.

And the defendant also submits to the referee herein the following rulings upon questions of law which it desires the referee to make to the second alleged cause of action herein:

Conclusions of Law.

Refused. J. L. First. During the year ending November 1st, 1882, the defendant was not a corporation doing business within the State of New York within the meaning of ch. 542, L. 1880, as amended by ch. 361, L. 1881, and ch. 151, L. 1882, and was not during said year liable to be taxed under said statute.

47 If the referee refuses to find the first conclusion of law he is requested to find as follows:

Refused. J. L. Second. The defendant is and was at all times during the year ending November 1st, 1882, a manufacturing corporation carrying on manufacture within the State of New York, and is and was at all times during the year ending November 1st, 1882, one of the classes of corporations excepted from the operation of section 3 of chap. 542 of the Laws of 1880, as amended by ch. 361 of the Laws of 1881 and ch. 151 of the Laws of 1882, namely, a manufacturing corporation carrying on manufacture within the State of New York, and was not during the said year liable to be taxed under said statute.

If the referee refuses to find either of the above conclusions of law he is requested to find as follows:

Refused. J. L. Two and one-half. The defendant was, during the year ending November 1st, 1882, a foreign manufacturing corporation manufacturing without this State, but doing a portion of its business in this State.

Refused. J. L. Third. The defendant has not neglected or refused to pay any tax required to be paid by L. 1880, ch. 542, as amended by L. 1881, ch. 361, and L. 1882, ch. 151, and no tax can be recovered in this action.

Refused. J. L. Fourth. Ch. 542, L. 1880, as amended by L. 1881, ch. 361, and L. 1882, ch. 151, is invalid and inoperative as to the defendant and imposes no legal obligation upon the defendant to pay any tax, because it establishes an

48 unjust and unequal system of taxation, in that it attempts to fix the amount of tax to be paid by the defendant wholly without regard to the extent of corporate franchises exercised by it within the State of New York and without regard to the amount of business done by it within said State, or the amount of property employed within said State, or the amount of property owned by it and situated within said State, and without regard to the amount of its capital stock held in this State, and without regard to the extent of the protection and benefits derived from the laws or agencies of this State, and because it seeks in effect to tax property and persons not within the jurisdiction of this State or in any way subject to its authority and violates all principles of equality and uniformity.

Refused. J. L. Fifth. Ch. 542, L. 1880, as amended by L. 1881, 361, and L. of 1882, ch. 151, is in violation of the constitution of the State of New York, never became

law, and is void, and no tax is legally imposed upon the defendant thereby or can be collected from it thereunder.

Refused. J. L. Sixth. Ch. 542, L. 1880, as amended by L. 1881, ch. 361, and L. 1882, ch. 151, is invalid in so far as it attempts to impose upon defendant the tax herein sued for, in that it is in violation of and repugnant to the Constitution of the United States, and the authority attempted to be exercised under the State of New York and dependent upon the said statute is invalid in that it is in violation of and repugnant to the Constitution of the United States, and said statute never became law and is void, and no tax is legally imposed upon this defendant thereby or
49 can be collected from it thereunder, and the particular grounds of said repugnance are that the taxation of defendant attempted by the said statute would take the private property of defendant for public use without just compensation, and would be a denial to this defendant by the State of New York of the equal protection of its laws, and would be a deprivation by said State of the property of the defendant without due process of law, and would be a regulation of commerce among the several States, and would interfere with the sovereignty of the State of Utah, and would tax property and business without the jurisdiction of the State of New York.

Refused. J. L. Seventh. Under the titles, privileges, and immunities which belong to the defendant under the Constitution of the United States and which it specially sets up and claims it is not subject to the assessment and taxation provided for in ch. 542, L. 1880, as amended by ch. 361, L. 1881, and ch. 151, L. 1882, and said statute never became law and is void, and no tax is legally imposed upon this defendant thereby or can be collected from it.

Refused. J. L. Eighth. Defendant was, during the year ending November 1st, 1881, a foreign manufacturing corporation carrying on manufacture in the State of New York within the meaning of L. 1880, ch. 542, as amended by L. 1881, ch. 361, and the amount of capital stock which is the basis for tax under the provisions of the Laws 1880, chap 542, as amended by Laws 1881, chap. 361, and L. 1882, ch. 151, is only that employed during said year within said State.

Refused. J. L. Ninth. During the year ending November 1st, 1882, the defendant had no capital employed
50 within the State of New York within the meaning of said statute.

Refused. J. L. Tenth. The complaint should be dismissed with costs.

If the referee refuses to make the above rulings upon questions of law, then the defendant submits to the referee herein the following rulings upon questions of law which it desires the referee to make as to the second alleged cause of action herein.

Refused. J. L. Eleventh. The capital of the defendant was, during the year ending November 1st, 1882, only partially employed within the State of New York within the

meaning of L. 1880, ch. 542, as amended by L. 1881, ch. 361, and L. 1882, ch. 151, and the amount of capital stock which is the basis for tax under the provisions of Laws 1880, chap. 542, as amended by Laws 1881, chap. 361, and L. 1882, ch. 151, is only that employed during said year within said State.

Refused. J. L. Twelfth. The amount of capital employed by the defendant within the State of New York during the year ending November 1st, 1882, which is the basis of tax under the provisions of Laws 1880, chap. 542, as amended by Laws 1881, chap. 361, and L. 1882, ch. 151, is $379,808.20.

Refused. J. L. Thirteenth. The defendant did not neglect or refuse to pay any tax required to be paid by Laws 1880, chap. 542, as amended by Laws 1881, chap. 361, and L. 1882, ch. 151, within fifteen days after the first day of January, 1882, and it never became the duty of the comptroller of the State of New York to add ten per cent. to the tax of the defendant, and the defendant is not liable therefor.

Refused. J. L. 51 Fourteenth. The defendant did not neglect or refuse to pay any tax required by Laws 1880, chap. 542, as amended by Laws 1881, chap. 361, and L. 1882, ch. 151, to be paid at any time prior to the commencement of this action, and it never became the duty of the comptroller of the State of New York to add ten per cent. to the tax of the defendant, and the defendant is not liable therefor.

The proper officers of this State of New York waived the payment of any percentage for the non-payment of tax claimed, and hence the defendant is not liable therefor.

Refused. J. L. Fifteenth. The percentage of $3,000 upon the amount of the tax claimed was not assessed in the usual manner of assessing the tax in Laws 1880, chap. 542, as amended by Laws 1881, chap. 361, and L. 1882, ch. 151, and the defendant is not liable therefor.

Refused. J. L. Sixteenth. The plaintiff is entitled to recover from the defendant, if anything, only the sum of $1,656.95.

DAVIES & RAPALLO,
Att'ys for Plaintiff, 32 *Nassau St., N. Y.*

52 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY. } Report of Referee.

I, the referee to whom it was referred to hear, try, and determine the issues in the above-entitled action, do certify and report—

That I have heard the proofs and allegations of the respective parties and find as facts with reference to the first cause of action alleged in the complaint herein—

I.

That the defendant is and was at all the times hereinafter mentioned and referred to a corporation duly incorporated and organized under the laws of the Territory of Utah, and was at all of said times doing business in this State and liable to be taxed on its corporate business under the provisions of section three of the act, chapter 542, of the Laws of this State of the year 1880, as amended by chapter 361 of the Laws of this State of the year 1881, and is not and was not at any of said times one of either of the classes of corporations, namely, "savings banks, institutions for savings, life insurance companies, banks, foreign insurance companies, or manufacturing corporations carrying on manufactures within this State," excepted from the operation of said section by the provisions thereof.

53 II.

That on or about the second day of December, 1881, pursuant to the provisions of section first of the statute aforesaid as amended, the treasurer of said defendant did make report in writing to the comptroller of this State, stating specifically the amount of capital of said corporation paid in, the date, amount, and rate per centum of each and every dividend declared by said corporation during the year ending with the first day of November, 1881, a copy of which report is annexed to and forms a part of the complaint herein, and is marked "Exhibit A."

III.

That the dividend or dividends made or declared by the defendant during the year ending with the first day of November, 1881, did not amount to six per centum upon the par value of its capital stock.

IV.

That the secretary and treasurer of the defendant, after having been duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, did, on or about the second day of December, 1881, estimate and appraise the capital stock of the defendant, upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at the sum of five millions of dollars, the same being its actual value in cash, and not less than the average price which said stock sold for during said year, and that thereupon they did forthwith forward to the comptroller of this State a certificate of said estimate and appraisal, accompanied by a copy of their said oath or affirmation, by them signed and duly attested (pursuant to the provisions of the statute aforesaid), a copy whereof is included in and forms a part of said "Exhibit A."

54 V.

That the amount of State tax for the year ending with said first day of November, 1881, imposed upon the defendant by the statutes

aforesaid is the sum of seven thousand five hundred dollars, and is at the rate of one and one-half mills upon each dollar of the valuation of the said capital stock made as aforesaid in accordance with the provisions of the first section of said statute and of the amendments thereto.

VI.

That by the provisions of the statutes aforesaid it became and was the duty of the treasurer or other officer having charge of said corporation to transmit the amount of said tax to the treasury of this State within fifteen days from the first day of January, 1882; that the said amount of State tax has not nor has any part thereof been transmitted to the treasury of this State, and that the defendant has wholly neglected to pay the same.

VII.

That the plaintiffs, by a stipulation made upon the trial herein and entered in the minutes, have waived all claim to interest upon said amount.

VIII.

That the report named in paragraph two of the first cause of action set forth in the complaint was made under and accompanied by a protest, of which the protest endorsed upon the copy of the certificate of estimate and appraisal annexed to the complaint herein and marked "Exhibit A" is a copy.

IX.

55 That the certificate of estimate and appraisal named in the fourth paragraph of the first cause of action set forth in the complaint was made under and accompanied by a protest, of which the protest endorsed upon the copy of the certificate of estimate and appraisal annexed to the complaint herein and marked "Exhibit A" is a copy.

X.

That the defendant has never exercised any franchises acquired under the laws of this State.

XI.

That the entire capital stock of the defendant, of ten millions of dollars, issued upon its formation, was issued for the mine and general plant of the company in Utah.

XII.

That the capital of the defendant during the year ending November first, 1881, was only partially employed within this State.

XIII.

That the defendant paid taxes both in the Territory of Utah and the State of Illinois for the year 1881.

And as Conclusions of Law.

I.

That by reason of the premises the defendant is indebted to the plaintiffs in the said sum of seven thousand five hundred dollars, the amount of said tax.

56 II.

That by reason of the premises the defendant became and is indebted to the plaintiffs in the sum of seven hundred and fifty dollars, said sum being a penalty of ten per centum on said unpaid tax for the year for which said tax had remained unpaid, which, by the second section of said act, as amended, the defendant became and is liable to pay to the plaintiffs in addition to said tax.

III.

That neither the matters alleged in the paragraphs numbered seven and eight of the third defense to said first cause of action set forth in the answer herein, nor the matters alleged in the paragraphs numbered two and three of the fourth defense to said first cause of action set forth in the answer herein, nor the matters alleged in the paragraph numbered four of the fifth defense to said first cause of action set forth in the answer herein, nor the matters alleged in either of said paragraphs constitute a defense or partial defense to said first cause of action.

And I further find and decide as facts, with reference to the second cause of action alleged in the complaint herein:

I.

The same facts that are found and decided in paragraph numbered one of the findings of fact with reference to the first cause of action herein.

II.

That on or about the 19th day of December, 1882, pursuant to the provisions of section first of the statute aforesaid, as amended, the treasurer of said defendant did make report in writing to the comptroller of this State, stating specifically the amount of capital
57 of said corporation paid in, the date, amount, and rate per centum of each and every dividend declared by said corporation during the year ending with the first day of November, 1882, a copy of which report is annexed to and forms a part of the complaint herein and is marked "Exhibit B."

III.

That the dividends made or declared by the defendant during the year ending with the first day of November, 1882, amounted to more than six per centum upon the par value of its capital stock, to wit, to twelve per centum upon the par value thereof.

IV.

That the amount of State tax for the year ending with said first day of November, 1882, imposed upon the defendant by the statute aforesaid as amended is the sum of thirty thousand dollars, and is at the rate of one-quarter mill upon said defendant's capital stock for each one per centum of dividend made or declared as aforesaid.

V.

That by the provisions of the statute aforesaid as amended it became and was the duty of the treasurer or other officer having charge of said corporation to transmit the amount of said tax to the treasury of this State within fifteen days from the first day of January, 1883, but that the said amount of tax has not nor has any part thereof been transmitted to the treasury of this State, and that the defendant has wholly neglected to pay the same.

VI.

58 That the plaintiffs by a stipulation made upon the trial herein and entered in the minutes have waived all claims to interest upon said amount.

VII.

That the report named in paragraph number two of the second cause of action set forth in the complaint was made under and accompanied by a protest, of which the protest accompanying the copy of said report annexed to the complaint herein and marked "Exhibit B" is a copy.

VIII.

That the defendant paid taxes in the Territory of Utah and in the State of Illinois for the year 1882.

IX.

That a year had not elapsed when this action was commenced since the last above mentioned tax became payable.

And as Conclusions of Law.

I.

That by reason of the premises the said defendant is indebted to the plaintiffs in the said sum of thirty thousand dollars, the amount of said last-mentioned tax.

II.

That by reason of the premises the said defendant became and is indebted to the plaintiffs in the sum of three thousand dollars, said sum being a penalty of ten per centum on said last men-
59 tioned unpaid tax, which by the second section of said act as amended the defendant became and is liable to pay to the plaintiffs in addition to said tax.

III.

And that neither the matters alleged in the paragraphs numbered seven and eight of the third defense to said first cause of action set forth in the answer herein, nor the matters alleged in the paragraphs numbered two and three of the fourth defense to said first cause of action set forth in the answer herein, nor the matters alleged in the paragraph numbered four of the fifth defense to said first cause of action set forth in the answer herein, nor the matters alleged in either of said paragraphs and stated to be repeated in the defense to the second cause of action constitute a defense or partial defense to said second cause of action.

IV.

And that by reason of all the matters found and decided as aforesaid the plaintiffs are entitled to recover of the defendant herein the sum of forty-one thousand two hundred and fifty ($41,250) dollars.

V.

And I direct that judgment be entered herein accordingly.
Dated Albany, N. Y., April 21st, 1885.

I. LAWSON, *Referee.*

Fees, $315, paid.

60 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE HORN SILVER MINING COMPANY.	Exceptions of Defendant to Findings of Referee and to Refusals of Referee to Find in Accordance with Defendant's Requests.

The defendant above named, by Davies, Cole & Rapallo, its attorneys, hereby excepts to the following findings of fact of Isaac Lawson, Esq., referee, in his report herein, dated April 21, 1885, as follows:

First. To the whole of the said referee's first finding of fact and to each and every part thereof, except so much of said finding as finds that the defendant "is and was at all times hereinafter mentioned and referred to a corporation duly incorporated and organized under the laws of the Territory of Utah."

Second. To the whole of the fifth finding of fact of said referee and to each and every part thereof.

Third. To the whole of the sixth finding of fact of said referee and to each and every part thereof.

And the said defendant hereby excepts to the following conclusions of law in respect to the first alleged cause of action herein found by said referee as follows:

First. To the whole of the first conclusions of law of said referee and to each and every part thereof.

Second. To the whole of the second conclusion of law of said referee and to each and every part thereof.

Third. To the whole of the third conclusion of law of said referee and to each and every part thereof.

61 II.

And the said defendant also hereby excepts to the following findings of fact of said referee in respect to the second alleged cause of action herein as follows:

First. To the whole of the first finding of fact of said referee, except so much thereof as finds that the defendant "is and was at all the times hereinafter mentioned and referred to a corporation duly incorporated and organized under the laws of the Territory of Utah."

Second. To the whole of the fourth finding of fact of said referee and to each and every part thereof.

Third. To the whole of the fifth finding of fact of said referee and to each and every part thereof.

Fourth. To the whole of so much of the said referee's ninth finding of fact and each and every part thereof as implies that any tax became payable from this defendant.

And the said defendant also hereby excepts to the following conclusions of law in respect to the second alleged cause of action herein found by said referee:

First. To the whole of the said referee's first conclusion of law and to each and every part thereof.

Second. To the whole of the said referee's second conclusion of law and to each and every part thereof.

Third. To the whole of the said referee's third conclusion of law and to each and every part thereof.

Fourth. To the whole of the said referee's fourth conclusion of law and to each and every part thereof.

Fifth. To the whole of the said referee's fifth conclusion of law and to each and every part thereof.

62 The defendant above named, by Davies, Cole & Rapallo, its attorneys, excepts as follows to the refusals of Isaac Lawson, Esq., referee, to find as requested by defendant in the above-entitled action:

First. To the refusal of said referee to find as a proposition of fact so much of the defendant's fourth request herein as is contained in the words "substantially the whole or."

Second. To the refusal of the said referee to find as a proposition

of fact so much of the defendant's sixth request as is contained in the words "substantially the whole or."

Third. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's seventh request herein.

Fourth. To the refusal of the said referee to find as a proposition of fact in accordance with so much of defendant's eighth request as is contained in the word "manufacturing."

Fifth. To the refusal of the said referee to find as a proposition of fact in accordance with the defendant's ninth request herein.

Sixth. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's sixteenth request herein.

Seventh. To the refusal of the said referee to find as a proposition of fact in accordance with so much of defendant's seventeenth request to find as is contained in the word "manufacturing."

Eighth. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's twenty-first request herein.

63 Ninth. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's twenty-second request to find herein.

Tenth. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's twenty-third request herein.

Eleventh. To the refusal of the said referee to find as a proposition of fact in accordanee with defendant's twenty-fourth request to find herein.

Twelfth. To the refusal of the said referee to find as a proposition of fact so much of defendant's twenty-fifth request to find as asks a finding of a waiver.

And the said defendant also excepts to the refusals of the said referee to find as conclusions of law in respect to the first alleged cause of action herein in accordance with defendant's requests, as follows:

First. To the refusal of the said referee to find as a conclusion of law in accordance with defendant's first request to find.

Second. To the refusal of the said referee to find as a conclusion of law in accordance with defendant's second request to find.

Two and one-half. To the refusal of the said referee to find as a conclusion of law in accordance with the request of said defendant No. $2\frac{1}{2}$ herein.

Third. To the refusal of the said referee to find as a conclusion of law in accordance with the third request of defendant herein.

Fourth. To the refusal of the said referee to find as a conclusion of law in accordance with the fourth request of defendant herein.

64 Fifth. To the refusal of the said referee to find as a conclusion of law in accordance with the fifth request of defendant herein.

Sixth. To the refusal of the said referee to find as a conclusion of law in accordance with the sixth request of defendant herein.

Seventh. To the refusal of the said referee to find as a conclusion of law in accordance with the seventh request of defendant herein

Eighth. To the refusal of the said referee to find as a conclusion of law in accordance with the eighth request of defendant herein.

Ninth. To the refusal of the said referee to find as a conclusion of law in accordance with the ninth request of defendant herein.

Tenth. To the refusal of the said referee to find as a conclusion of law in accordance with the tenth request of defendant herein.

Eleventh. To the refusal of the said referee to find as a conclusion of law in accordance with the eleventh request of defendant herein.

Twelfth. To the refusal of the said referee to find as a conclusion of law in accordance with the twelfth request of defendant herein.

Thirteenth. To the refusal of the said referee to find as a conclusion of law in accordance with the thirteenth request of defendant herein.

Fourteenth. To the refusal of the said referee to find as a conclusion of law in accordance with the fourteenth request of defendant herein.

65 Fifteenth. To the refusal of the said referee to find as a conclusion of law in accordance with the fifteenth request of defendant herein.

Sixteenth. To the refusal of the said referee to find as a conclusion of law in accordance with the sixteenth request of defendant herein.

Seventeenth. To the refusal of the said referee to find as a conclusion of law in accordance with the seventeenth request of defendant herein.

II.

The said defendant also excepts to the following refusals of the said referee to find as propositions of fact in accordance with the requests of the defendant in respect to the second alleged cause of action herein, as follows:

First. To the refusal of the said referee to find so much of defendant's fourth request to find as a proposition of fact as is contained in the words "substantially the whole or."

Second. To the refusal of the said referee to find in accordance with so much of defendant's sixth request to find as a proposition of fact as is contained in the words "substantially the whole or."

Third. To the refusal of the said referee to find in accordance with defendant's seventh request to find as a proposition of fact.

Fourth. To the refusal of the said referee to find in accordance with so much of defendant's eighth request to find as a proposition of fact as is contained in the word "manufacturing."

Fifth. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's ninth request to find.

66 Sixth. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's fourteenth request to find.

Seventh. To the refusal of the said referee to find as a proposition

of fact in accordance with so much of defendant's fifteenth request to find as is contained in the word "manufacturing."

Eighth. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's nineteenth request to find.

Ninth. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's twentieth request to find.

Tenth. To the refusal of the said referee to find as a proposition of fact in accordance with defendant's twenty-first request to find.

Eleventh. To the refusal of the said referee to find as a proposition of fact in accordance with so much of defendant's twenty-second request to find as asks a finding of waiver.

And the said defendant hereby excepts to the following refusals of the said referee to find in accordance with defendant's requests as to conclusions of law in respect to the second alleged cause of action herein:

First. To the refusal of the said referee to find as a conclusion of law in accordance with the first request of said defendant.

Second. To the refusal of the said referee to find as a conclusion of law in accordance with the second request of said defendant.

67 Two and a half. To the refusal of the said referee to find as a conclusion of law in accordance with the second and a half request of said defendant.

Third. To the refusal of the said referee to find as a conclusion of law in accordance with the third request of said defendant.

Fourth. To the refusal of the said referee to find as a conclusion of law in accordance with the fourth request of said defendant.

Fifth. To the refusal of the said referee to find as a conclusion of law in accordance with the fifth request of said defendant.

Sixth. To the refusal of the said referee to find as a conclusion of law in accordance with the sixth request of said defendant.

Seventh. To the refusal of the said referee to find as a conclusion of law in accordance with the seventh request of said defendant

Eighth. To the refusal of the said referee to find as a conclusion of law in accordance with the eighth request of said defendant.

Ninth. To the refusal of the said referee to find as a conclusion of law in accordance with the ninth request of said defendant.

Tenth. To the refusal of the said referee to find as a conclusion of law in accordance with the tenth request of said defendant.

Eleventh. To the refusal of the said referee to find as a conclusion of law in accordance with the eleventh request of said defendant.

Twelfth. To the refusal of the said referree to find as a
68 conclusion of law in accordance with the twelfth request of said defendant.

Thirteenth. To the refusal of the said referee to find as a conclusion of law in accordance with the thirteenth request of said defendant.

Fourteenth. To the refusal of the said referee to find as a conclusion of law in accordance with the fourteenth request of said defendant.

Fifteenth. To the refusal of the said referee to find as a conclusion of law in accordance with the fifteenth request of said defendant.

Sixteenth. To the refusal of the said referee to find as a conclusion of law in accordance with the sixteenth request of said defendant.

DAVIES, COLE & RAPALLO,
Attorneys for Defendant, 32 *Nassau Street, New York*.

69 *Papers on Motion for Extra Allowance.*

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

GENTLEMEN: Please take notice that on the affidavit of Denis O'Brien, copy of which is herewith served on you, and on all the proceedings in this cause I will move this court, at a special term thereof to be held by Mr. Justice T. R. Westbrook at Kingston, N. Y., on the 9th day of May, 1885, at 12 o'clock noon, or as soon thereafter as counsel can be heard, that an allowance be made to plaintiffs in addition to the usual costs.

Dated April 27th, 1885.

Yours, &c.,

D. O'BRIEN,
Attorney General, Plaintiffs' Attorney.

To Davies & Rapallo, Esqrs., defendant's attorneys.

70 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

STATE OF NEW YORK,
Albany City and County, } *ss:*

Denis O'Brien, of said city and county, being duly sworn, says that he is the attorney general of the State of New York, and that he has assisted in the prosecution of this case in behalf of the plaintiffs and is conversant with the nature and amount of work involved.

That this is an action brought under the provisions of section 3 of chapter 542 of the Laws of 1880, as amended by chapter 361 of the Laws of 1881, to recover the sum of $7,500, dividend tax for the year 1881, together with two annual penalties of 10 per cent. upon that amount for non-payment of the tax, and the sum of $30,000, tax for 1882, and one penalty of 10 per cent. upon that amount.

That the summons and complaint were served herein June 26, 1883, and issue joined August 3, 1883.

That an order of reference to Isaac Lawson, Esq., of Albany, N. Y., to hear and determine was, on stipulation of all parties in interest herein, entered herein on the 8th day of November, 1883.

That the trial before the referee was commenced December 18th, 1883, at New York city.

That an extraordinary amount of evidence was taken, and that on account of the vigor and spirit of the defense, as displayed in its very characteristic answer, matter of final submission was protracted, owing to the examination of questions of law and fact of very serious difficulty.

71 That the questions raised by the defense, as appears by the answer, and which required careful and thorough examination before proceeding to the trial of this cause, are as follows:

I. The constitutionality of the Laws of 1880, chapter 542, as amended by Laws of 1881, chapter 361, and Laws of 1882, chapter 151, in that it imposes taxes upon property or franchises not within the territorial limits of New York.

II. That it is not doing business within the State within the meaning of the statute, or that it is a manufacturing corporation carrying on manufacture within this State, and is on either ground excepted from the operations of the statutes at bar.

III. That the amount of capital which should be the basis for the tax due (if any) January, 1882, is only that employed within this State.

IV. That the defendant, as a foreign manufacturing corporation doing business within this State, is within the construction given by Comptroller Davenport to this statute, which construction limits the basis of tax in the case of such corporations as stated.

V. That the estimate and appraisal of the capital stock of said corporation by its secretary and treasurer was under protest.

VI. That its entire capital stock of $10,000,000 was issued in payment of real estate situated in the Territory of Utah and in the State of Illinois, consisting entirely of mining property and improvements therein and of a refinery.

VIII. That during the year ending November 1st, 1881, this defendant carried on in the State of New York the business of manufacturing bars of silver sent here from the Territory of Utah

72 and State of Illinois into standard bar, and that said business constitutes but a small portion of its entire business and was the only business carried on by it during said year within the State of New York, except a part of its financial business and correspondence.

IX. That its capital during said year ending Nov. 1st, 1881, was only partially employed within this State.

X. That it paid taxes both in the Territory of Utah and State of Illinois for the year 1881.

XI. That the percentage of $1,500 in said first cause of action named has not been assessed in the usual manner of assessing the taxes in said statute named.

XII. That it has not neglected or refused to pay the alleged tax sued for in said second alleged cause of action.

XIII. That the percentage of $3,300 in said second alleged cause of action named has not been assessed in the usual manner of assessing the taxes in said statute named.

XIV. That a year has not elapsed since the alleged tax was payable, as alleged.

XV. That questions of grave importance under the Constitution of the United States were raised on the final submission of this cause, which required a thorough and exhaustive examination.

That the number of days approximately occupied in preparing for trial was five, and in arguing the cause on the evidence so taken one more, together with two days occupied in taking testimony.

That defendant's brief consists of 94 solidly written pages on typewriter.

That the final submission of case to referee was on January 25th, 1885.

73 That the report of the referee has been received, directing judgment for the plaintiffs in the sum of $41,250.

That deponent, through one of the clerks of the attorney general's office, made application to said referee after the filing of his report for a certificate as to the labor involved in the trial of this cause on which to move for an additional allowance, and was informed by said referee that he had never, in the many cases he had tried as referee, given such a certificate, for the reason that he had been and was unable to find any authority for so doing, but said that he believed there would be no trouble in securing an extra allowance if the court would only look at the pleadings.

That for this reason no referee's certificate as above named is here presented.

That by reason of the foregoing facts deponent verily believes that this is a difficult and extraordinary case, and that an additional allowance should be awarded plaintiffs, as provided for by section 3253 of the Code of Civil Procedure. Deponent further says that this case was pending at the time he became attorney general, and that the matters and things herein alleged are gleaned from the records and papers of this office, and said allegations are made on information and belief of deponent.

D. O'BRIEN.

Sworn to before me this 30th day of April, 1885.

FRANCIS B. DELEHANTY,
Notary Public, Albany, N. Y.

74 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE HORN SILVER MINING COMPANY.	Affidavit of E. L. Short in Opposition to Motion for Extra Allowance.

CITY AND COUNTY OF NEW YORK, *ss:*

Edward Lyman Short, being duly sworn, deposes and says that he is one of the attorneys for the defendant above-named and is familiar with the above-entitled action from its commencement; that this action is unprecedented in actions upon these to such that

the defendant is a foreign corporation, incorporated under the laws of the Territory of Utah, and that the referee herein has found that the defendant during the years ending November 1st, 1881, and November 1st, 1882, did outside of the State of New York the main corporate business which it was chartered to transact, and that the entire capital stock of the defendant was issued in payment of real estate situated in the Territory of Utah and State of Illinois; that it is at present and has been since January, 1882, the practice of the successive comptrollers of the State of New York to tax, under a general rule, both foreign and domestic railroad, telephone, trading corporations and corporations manufacturing outside of the State of New York only so much of the capital stock of said corporations as is represented by their property within the State of New York; that the above-entitled action was commenced in June, 1882, and January, 1883; that prior to the commencement of this action the comptroller of the State of New York did, in November, 1881, issue a circular, a copy of which is annexed hereto, marked Exhibit A,
to the effect that foreign manufacturing corporations carrying
75 on manufacture in the State of New York should pay a tax based upon the proportionate amount of their capital employed within the State; that the said comptroller did accept taxes from foreign manufacturing corporations carying on the manufacture within this State based upon such proportionate amount of capital in January, 1882; that about May 12th, 1882, the Legislature of this State passed chapter 151 of the Laws of 1882, of which law the present comptroller, in a report sent to the Legislature, dated April 14th, 1885, stated that it seemed to "contain a suggestion of the principle that the tax upon the franchises or business of a corporation doing business both within and without the State might be levied only upon that portion of its capital which was actually employed within the State; that the comptroller in October, 1882, issued a circular to the effect that the proper construction of the law was that foreign corporations whose capital was only partially employed within the State should pay a tax based only upon the proportionate amount of capital employed within this State.

Deponent further says that the plaintiff, prior to the commencement of this action, offered to pay to the State a tax based upon its proportionate amount of capital employed within this State, in accordance with the administrative construction placed upon the law by the comptroller, but the comptroller refused to extend this construction to mining corporations; that at the date of the commencement of this action the act of 1882 had not been construed by any court, and that no action involving the taxation of foreign corporations under the acts of 1881 and 1882 and had reached the court of appeals, and that the law was wholly unsettled as to them; that Attorney Russell, in November, 1882, advised the comptroller that the rule of taxation laid down in his said circular of October, 1882, was correct.

Deponent further says that in the month of October, 1884, the court of appeals decided the case of The People *vs.* The Equitable

Trust Company, which action involved taxes to January,
76 1882, prior to the passage of the act of May, 1882, and in which case the court of appeals intimated that a corporation such as the defendant, which does substantially the whole of the main corporate business which is chartered to transact outside the State of New York, was not doing business within this State within the meaning of the act taxing foreign corporations, and said that the solution of such question, when properly presented, might "relieve this act of some of its features which would seem to be arbitrary, oppressive, and unjust."

Deponent further says that this action has been brought and carried on as a test action to settle the law upon this subject, and that the claims advanced in action are contrary to the administrative construction of the law; that mining companies, whose capital is only partially employed within this State, are singled out of all other corporations so situated and attempted to be taxed upon the entire capital wherever employed.

Deponent further says that in the report of Comptroller Chapin to the Legislature of 1885 the latter says of this and other litigations: "Such litigations will, in the end, be valuable to the State, inasmuch as the law will receive conclusive interpretation upon all points open to reasonable or unreasonable question" (see page 9).

Deponent further says that the comptrollers have heretofore waived the payment of any penalties in the case of various corporations embraced within the provisions of the corporation tax statutes after the tax became due, and because the law had not been settled in reference to the taxation of such corporations.

Deponent further says that testimony was taken in the above action on December 18th, 1883, in the city of New York, and that further testimony was taken on December 20th, 1883, in the city of Albany; that no testimony was taken upon any other day, and that the attorney general was not required to appear in New York except on the said December 18th, 1883; that the action was not finally submitted to the referee until January 5th, 1885; that this
77 delay was by the mutual consent of the attorney general and the defendant's attorneys, in view of the attempt to pass a bill in the Legislature of 1884 applying to the act of 1882 the administrative construction adopted by the comptroller; that said bill passed the Legislature, but failed to receive the signature of Governor Cleveland; that the delay was also occasioned by the desire of both parties to await the decision of the case of the Equitable Trust Company, which was not decided until October, 1880, although argued in April, 1884.

Deponent further says that the only brief submitted by the attorney general was one covering 11 type-written pages; that the defense set up in the answer in respect to the unconstitutionality of the statute under the laws of the State of New York and the laws of the United States were not alluded to in defendant's briefs, and the attorney general in his brief claimed that they had all been settled by the previous decision of the court of appeals.

Deponent further says that plaintiff's direct testimony consisted

in an examination of the treasurer of the defendant to the extent of six type-written pages; that plaintiff offered no other direct testimony and simply cross-examined the vice-president and secretary of the defendant and the corporation tax clerk of the comptroller's office, who were called as witnesses for the defendant.

Deponent further says that the testimony offered was practically directed to but two points—one to show the character of the business of the defendant and where the capital was employed, and the other the practice of the comptroller's office in the taxation of corporations under the said statutes.

Deponent further says that with the exception of mutual stipulations for adjournments there have been no proceedings whatever in this action under the administration of the present attorney general, except one day's hearing before the referee on the final submission of the case.

78 Deponent further says that there have been no traveling expenses on the part of the State in connection with this action, except the said visit to New York, and that nothing has been done in it to require any special outlay outside of the ordinary routine expenses of the attorney general's office.

That by the judgment in this action the plaintiff is obliged to pay a tax of $7,500 for the year 1881, together with a penalty of $750, and a tax for the year 1883 of $30,000, together with a penalty of $3,000.

Deponent further says that, in view of the circumstances of the case, he regards the imposition of these penalties as most harsh and oppressive, and that it will be most unjust and inequitable to add to the amount of this judgment for taxes and penalties any further sum of money, which only goes to reduce the appropriation which the State may make for the support of the office of the attorney general; that five per cent. upon the amount recovered would amount to the large sum of $2,062.50; that defendant has paid the State and the State has accepted, on account of taxes for the years 1883 and 1884, the sums of about $1,600 and $1,500, respectively, being taxes computed upon the proportionate amount employed within this State during said years, amounting in each year to over $500,000.

Deponent further says that he has examined the records of all cases that have gone to the court of appeals involving taxation under these statutes, and that in none of them has the State ever asked for or recovered a penalty or an extra allowance, except that a penalty was recovered in the recent telegraph cases.

EDWARD LYMAN SHORT.

Sworn to before me this 8th day of May, 1885.

WILLIAM J. C. BERRY,
Notary Public, N. Y. Co.

79 A.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *November*, 1881.

DEAR SIR: Yours of —— is received. It will be noticed that the tax imposed by act, chapter 361, Laws of 1881, is due on the franchise or business of corporations. After a careful consideration of the provisions of section 3 of the above-mentioned act, I shall hold that a fair interpretation demands that manufacturing corporations not organized under the laws of this State manufacturing without this State but doing a portion of their business within this State shall pay a tax to this department based upon the proportionate amount of their capital employed within this State, the amount of business done within the State to be taken into consideration in arriving at the proportionate amount of capital thus employed. In making your report please state the total amount of capital of the company as well as the amount employed in this State.

Yours respectfully,

—— ——,
Comptroller.

B.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *October 12th*, 1882.

To the proper officer of the company.

DEAR SIR: After consultation between this department and the department of finance of New York city, your company (as
80 per address on accompanying envelope) has been deemed subject to taxation under chapter 361, Laws of 1881. The New York city assessors will, therefore, exempt your personal property in that city from taxation for State purposes.

I trust you will promptly comply with the provisions of the act mentioned, a copy of which is sent to you to-day, and also a blank for report. The report should be made by November 15, proximo, and the tax will be due January 15, 1883.

After a careful consideration of the provisions of section 3 of the act, I shall hold that a fair interpretation demands that corporations not organized under the laws of this State but doing a portion of their business within this State shall pay a tax to this department based upon the proportionate amount of their capital employed within this State, the amount of business done within this State to be taken into consideration in arriving at the proportionate amount of capital thus employed. In making your report please state the total amount of capital of the company as well as the amount employed in this State.

Yours respectfully,

—— ——,
Comptroller.

Memorandum on Granting Motion for Extra Allowance.

WESTBROOK, *J.*:

I have repeatedly decided that the test in regard to an allowance

should be that which the code (§ 3253) makes, to wit, was it "a difficult and extraordinary case?" If an allowance is made to depend upon the supposed hardship to the defendant, or its absence, a rule is introduced in the practical application of which no legal principle is the guide, and the mere motive or feeling of the judge will
81 control. I decline, therefore, in this case to look at its supposed hardship. If the decision of the referee is hard because it is wrong, it will be reversed on appeal and an allowance will fall with it; if, however, it is claimed to be hard because the law is said to be oppressive upon which the recovery is predicated, a judge may well be excused from listening to an objection against an allowance founded upon an argument that a statute law of the State, which is supposed to embody the wisdom of the legislative department of the State, imposes harsh and oppressive burdens. Entertaining these views, the motion for an allowance will be granted. It will not, however, be five per cent. upon the sum recovered; that would give an amount too large. The affidavit of the attorney general shows five days spent in preparing the cause for trial, two days in taking evidence, and one upon the argument—eight days in all. Under the circumstances, $500 is fixed as the allowance. The recovery is $41,250, it is true; but, looking at the time spent, the amount fixed seems to be just and fair.

82 *Order Granting Extra Allowance.*

At a special term of the supreme court of the State of New York held at Kingston, N. Y., on the 9th day of May, 1885.

Present: The Honorable T. R. Westbrook, justice, presiding.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

On reading and filing the affidavit of Denis O'Brien and all the other papers and proceedings had in the above-entitled action, whereby it appears that the plaintiffs have recovered in this action the sum of $41,250, and the same being a difficult and extraordinary case, it is, on motion of Mr. Isaac H. Maynard, for the plaintiffs, Mr. Julien T. Davies appearing for the defendant—

Ordered that plaintiffs be allowed five hundred dollars by way of additional costs.

Enter. Albany county.

T. R. WESTBROOK,
Justice Supreme Court.

To Davies, Cole & Rapallo, Esqs., attorneys for defendant.

GENTLEMEN: Please take notice that the foregoing is a copy of the order entered herein in the office of the clerk of the county of Albany on the 3d day of June, 1885.

Yours, &c.,
D. O'BRIEN,
Attorney General and Attorney for Plaintiffs.

83 *Judgment.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

The issues joined in this action having been referred to Hon. Isaac Lawson, as referee, to hear, try, and determine, and said referee having heard the proofs and allegations of the respective parties and rendered his report therein, finding that the plaintiff *is* entitled to judgment in this action for the sum of $41,250, and for costs, to be adjusted, and such costs having been duly adjusted at the sum of $909.75:

Now, on motion of D. O'Brien, attorney general, it is ordered, adjudged, and decreed—

That the plaintiffs recover of the defendant the sum of $42,159.75, and have execution therefor.

Judgment signed this 3d day of June, 1885.

WM. D. STREVELL, *Clerk.*

To Davies, Cole & Rapallo, attorneys for the defendant.

GENTLEMEN: Please take notice that the foregoing is a copy of the judgment entered herein in the office of the clerk of the county of Albany on the 3d day of June, 1885.

Yours, &c., D. O'BRIEN,
Attorney General, Attorney for Plaintiffs.

84 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

SIRS: You will please take notice that the defendant above named hereby appeals to the general term of this court from the order entered herein in the office of the clerk of the county of Albany, on the 3d day of June, 1885, granting an additional allowance to the plaintiff, and from each and every part thereof

Dated N. Y., June 5th, 1885.

Yours, &c., DAVIES, COLE & RAPALLO,
Attorneys for Defendant.

To Hon. Denis O'Brien, attorney general, and William D. Strevill, Esq., clerk of the county of Albany.

85 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

SIRS: You will please take notice that the defendant herein hereby appeals to the general term of this court from the judgment made and entered herein in the above-entitled action on the 3d day of June, 1885, and from each and every part thereof.

You will further take notice upon such appeal the defendant intends to bring up for review an order made and entered herein, bearing date the 3d day of June, 1885, granting an additional allowance to the plaintiffs.

Dated N. Y., June 5th, 1885.

Yours, &c., DAVIES, COLE & RAPALLO,
Defendant's Attorneys.

To Hon. Denis O'Brien, attorney general, and William D. Strevill, Esq., clerk of the county of Albany.

86 *Case and Evidence.*

Supreme Court, New York County.

THE PEOPLE OF THE STATE OF NEW YORK
against
HORN SILVER MINING COMPANY.
Defendant's Proposed Case on Appeal.

The issues in this action came on for trial on the 18th day of December, 1883, before Isaac Lawson, Esq., referee herein.

Appearances.

Deputy Attorney General John C. Keeler and Mr. Wright, for plaintiffs.

Julien T. Davies, Esq., and Edward Lyman Short, Esq., for defendant.

The oath of the referee was waived by consent.

The following is all the evidence given upon the trial:

It is admitted by the defendant that the plaintiffs have properly computed, according to their theory, the amount of tax which they allege to be due by the defendant corporation to the State, which computation is contained in the complaint.

The plaintiffs offer in evidence the report made by the treasurer of the defendant for the year ending the 1st day of November, 1881, together with the protest and appraisement, thereto attached.

87 Received and marked "Plaintiffs' Exhibit 1," of this date. (See fol. 30.)

Plaintiffs offer in evidence the report made by the treasurer of

the defendant for the year ending the 1st day of November, 1882, together with the protest and appraisement, thereto attached.

Received and marked "Plaintiffs' Exhibit 2," of this date. (See fol. 44.)

WM. F. VAN PELT, called as a witness on behalf of plaintiffs, being duly sworn, testifies as follows:

In answer to Mr. KEELER—direct examination:

I reside at 12 West Twenty-third street, in the city of New York. I know of a corporation known as the Horn Silver Mining Company. I am treasurer of that company, and have been for three years from the 1st of January last. I am fully acquainted with its affairs and business. The company has had its office within the State of New York during that time. I have occupied its office as treasurer; that has been its treasurer's office. Its office is at 44 Wall street, and has been during these three years. The president of the corporation is Mr. Charles G. Francklyn. The directors of the company are Mr. Charles G. Francklyn, A. G. Campbell, Dennis Ryan, Mathew Cullen, Frank G. Brown, W. S. Hoyt, and A. Byram. The directors have met as such within this city during the past three years, have had regular meetings at 44 Wall street, and have transacted business for the company as directors. The books of the treasurer are at 44 Wall street. My duties as treasurer are generally—I have charge of the books, the drawing of money, and seeing that it is properly deposited. I do not sign any checks. The treasurer does not sign checks. I have deposited money belonging to the company in a bank within this State. All the moneys of the company do not come to New York, but all that do come are
88 deposited in the bank, and there is a considerable amount deposited each year. The secretary of the company is W. S. Hoyt, and he resides in the city of New York. He keeps the books of the company at 44 Wall street, and has his office there. The president also has his office there. The checks of the company are signed by the president or vice-president and secretary; they are signed usually in New York.

Q. What other business does the corporation do within this State aside from the depositing in bank, paying out of moneys, and the meetings of directors?

A. We complete the manufacture of silver bars—loan money—that covers about everything. We have no factory within this State—a smelting works.

Q. What do you mean by saying you complete the manufacture of silver bars?

A. Our bars come here to the assay office and are completed there. They are bettered there They come there as base bullion and are put into a finer state. That is done at the United States assay office. The company delivers the silver to the United States assay office.

Q. Does the company again receive the bars from the assay office?

A. We receive the value of them.

Q. What does the corporation do with them after they are brought here and delivered to the United States assay office?

A. We do not sell them, because if we desired we could get out the silver bars. They are bettered. I think there was an occasion something like a year ago when we had a lot of silver bars in the office back from the assay office. Instead of taking the actual receipt we took some of the silver bars. We took them to the office, probably, to exhibit them. I can't say for certain.

Q. In point of fact does not the company ship the bars into this State and sell them. Is it not that what he does with them?

A. We sell the receipts of the assay office as soon as the assay office has assayed the bars.

89 Q. Then the work done with these bars is to bring into the State, deliver them to the assay office, and that office, after putting them through the process of refining, issues to your company a receipt, and that receipt you sell?

A. Yes, sir. That is substantially an account of the business done by the corporation in regard to these bars. This business, together with the financial business and the meetings of directors that I have previously stated, constituted the work and business transacted by the corporation within this State, as far as I know. The correspondence of the corporation is conducted principally from 44 Wall street. Those letters which come here are answered here. We have a large amount of correspondence in Chicago and at Salt Lake which is answered there. We have very little correspondence at this office.

Mr. Davies offers in evidence exemplified copy of the articles of incorporation of the Horn Silver Mining Company filed in the county of Salt Lake, Territory of Utah, marked Defendant's Exhibit 1, of this date. (See fol. 461.)

In answer to Mr. DAVIES—cross-examination:

The annual meetings of the stockholders of the company are held in Utah, and that has always been the case since my connection with the company. The $10,000,000 of the capital stock of this company was issued on its formation for the mine and general plant of the company in Utah, which are situated at Frisco, Beaver county, Utah. There is a mine and smelting works at Frisco and then a smelting works at Francklyn, two hundred miles this side. In addition to the mine and smelting works at Utah we have several other properties outside the State of New York during the two years ending November 1st, 1882, consisting of a refinery at Chicago. The business during the two years ending November 1st, 1882, which this corporation carried on in Utah consisted of the mining and smelting of ores and manufacturing them into bullion. Sub-

90 stantially all the product of the mines during those two years was manufactured by the corporation into rough bullion bars in Utah, called base bullion. About three hundred men were employed in that business in Utah during those two years, who were paid in Utah. The financial operations of the corporation

were during that period carried on in Utah. These operations consisted of paying men, paying for supplies, and paying freights. Some lots of bullion was during those two years sold in Utah. Some of the results of the manufacture of ores into this base bullion were during this time sold in Utah. Large and frequent sales of ores, the product of the mine, were made in Utah. All the correspondence relative to these financial and other transactions that took place in Utah was conducted in Utah by our manager. During this period the company had a manager at Utah, who was invested with authority to conduct these operation of which I have spoken, and during these two years the practice of the company in continuing the manufacture of such base bullion as was not disposed of in Utah was to send it to Chicago to our refinery, where the bullion was separated—the lead from the silver; and during that time the company owned its own refinery in Chicago, where this work was done. We had a manager there representing us. The lead that was separated from the base bullion at Chicago was all sold at Chicago during these two years ending November 1st, 1882. The men that were employed in Chicago were paid in Chicago and all the expenses at Chicago were met in Chicago by our manager there. It was the practice for our managers to use the moneys received by them at Utah and Chicago at those places respectively on account of the company to meet the expenses accrued at those particular places. This was entirely so at Chicago and not so much at Utah. They do not get so much money at Utah, and they keep the money there to pay their expenses as far as it goes. At Chicago the expenses incurred there were entirely met from the receipts there. The degree of fineness of the silver bullion that
91 was forwarded from Chicago to New York after it had been partially manufactured there was 988, say, to 990, in one thousand parts. That would be about a fair average, running from 988 to 990 in 1,000 parts. Those silver-bullion bars contain, besides silver, a very small percentage of lead. There is a little copper, some dross, and a little gold.

Q. Your smelting works in Chicago and Utah, are they adapted to separate the gold from the ore?

A. We made no attempt to separate the gold. Those silver bars, after they had been worked at Chicago, were forwarded here to New York and consigned to the company here in New York. They were really delivered at our office, and we sent the man with the wagon to the assay office, where we deposited them there, and they issued a receipt. They simply weigh them and give us a receipt for what the bars weigh just as they stand. The next thing done with the bars was, in a general way, to go to work and separate the metals—take out all the dross and the gold that is in them, take out the copper and lead, and bring them down to a fineness of about 990 parts in 1,000.

They issue a certificate showing that we are entitled to so many silver ounces of $\frac{999}{1000}$ parts fine, and we can take the silver or take the receipt. We have the privilege of doing either, but we do not have the privilege of receiving back our own silver in bars. The

silver is mixed up with every one else's silver, but we have the privilege of receiving silver bars. We are informed that our silver when it goes in is mixed up with the silver of other depositors for the purpose of refining. In one instance we received back our own silver in the form of refined bars. We made this request for the purpose of getting our own silver. It is the only time. I don't know whether it is the practice to return the silver of a depositor in refined bars or not. We made the request to have our own silver back. The practice of the company in the transaction of its business was to sell the receipts that we received from the assay office, and our sales would be made after we had received the mem-
92 orandum, of which I have been speaking, giving the result of the refining process—that is, what we would sell, the second paper which we got after the refining process was completed. When we received the second paper we gave up the first paper. The loss in weight of the base bullion in going through the assay office is about two per cent.—two per cent. in value as we value it. The average market value of these base-bullion bars is about $1 an ounce, and our loss in weight and value would be about two per cent. The gain in the value of a mass of silver base bullion after it has gone through this process in the assay office is about ten per cent. The net gain during these two years from this process in the assay office is about eight per cent. My impression is from that, the best information and advice I have, that these silver bars are at our risk when they are going through this process in the assay office. Outside of the question of negligence on the part of those who have them in charge, the Government does not assume any risk as to the safety of the silver. After we have sold this memorandum or transferred it, then the party to whom we transfer is entitled to receive the bars from the assay office, and we really sell these bars by transferring the receipt. We sell the refined bars by selling the receipt at the assay office. It saves carrying the bars from our office and to our office. The average amount of silver bullion our company had within the State of New York during the year ending November 1st, 1881, was $26,641.94.

The average amount of cash on hand, by which I mean deposited in bank and subject to sight draft or check, the company had during the same year ending November 1st, 1881, was $29,188.63.

The average amount during the same year the company had loaned within the State of New York was $50,250.

The value of the office furniture of the corporation during the year ending November 1st, 1881, within the State of New York was about $500. The items to which I have testified comprise all
93 the property which the corporation had within the State of New York during the year ending November 1st, 1881.

The amount in the value of silver bars the corporation had within the State New York as an average during the year ending November 1st, 1882, was $51,555.41.

The average amount of cash in bank the corporation had within the State of New York for the year ending November 1st, 1882, was $40,345.65.

The average amount of money loaned the company had within the State of New York for the year ending November 1st, 1882, was $287,407.14.

The value of the office furniture during that year, same year, in the city of New York, was $500.

These items comprise all the property which the company had within the State of New York during the year ending November 1st, 1882. During these two years I have personally kept the books of the corporation. I arrived at these average amounts of silver in bars, cash on hand, and money loaned in this way: For the silver in bars the average is taken from the silver on hand at the end of each month, the cash taken from the cash book, the balance on hand at the end of each month, and the loans as shown by the ledger. I took the totals and divided them by twelve to get the average. From my knowledge of the books of the company and its business I regard that as a fair and candid method of arriving at these average amounts. I made an effort to arrive at these average amounts fairly and candidly, and I can conceive of no other or better way of doing it. This paper is in the form of the receipts which the company received during the two years ending November 1st, 1882, of such silver bullion bars as were deposited by it in the office of the United States Government assay.

Copy of receipt referred to offered in evidence. Receipt admitted in evidence and marked Defendant's Exhibit 2, of this date. (See fol. 497.)

94 This paper is in the form of second receipt that the company received with regard to such silver bars as were refined in the United States assay office during these two years and belonged to the company.

Copy of receipt referred to offered in evidence. Receipt admitted in evidence and marked Defendant's Exhibit 3, of this date. (See fol. 501.)

Those two certificates do not relate to the same transaction. The silver bullion represented by the first paper is still in the assay office for the purpose of refining, but the silver bullion represented by the second paper has been refined, and when the silver has been sold we retain that paper. The second paper is retained by the company as a memorandum of the transaction.

In answer to Mr. KEELER—redirect examination:

Both these papers go together to the purchaser and he has to deliver up the original receipt before he can get out the bars. If we take out the bars we have to give up the receipt. We sell to a purchaser—we give him the original and second receipt which has been put in evidence. He takes both of them. This large second one he gives back to us after he gets the bars. We do not get the second receipt until the bars are ready; the purchaser goes and gives up the first receipt, and we get the second receipt before we actually

give up the first receipt. The second receipt is for our information entirely.

The second memorandum statements are given to us when the bars are ready for sale. We get them from the assay office, and take them out on the street to the buyers of silver. They take them and from them find what we have there in the assay office. It shows that we have so many ounces of silver of .990 fineness, so many dollars and cents in gold, and these little scraps and odds and
95 ends, and the purchaser makes up his figures and makes his bid for the lot from that paper. After he has done that we expect to give him the first receipt, which enables him to go to the assay office and get the silver.

By the REFEREE: The first receipt is a statement of the unrefined metal and the second is a statement of what has resulted from it. The first receipt is endorsed over to the purchaser, the same as a check.

In answer to Mr. DAVIES—recross-examination:

Our company paid taxes in Utah and Illinois in 1881 and 1882. We are taxed in the Territory of Utah and State of Illinois for our mine products. We paid the bullion tax in Utah. We also paid the tax in Illinois upon the silver and lead that came there.

In answer to Mr. KEELER—redirect examination:

I kept the books of the corporation in this city, at the office, 44 Wall street. The dividends to the stockholders are paid from 44 Wall street. The greatest sum in bank that we had at any one time during the year 1881 was about the time of the dividend—just before the payment of the dividend—and was $300,000. We did not have in any month in 1881 a larger amount than $300,000. We did not have as large a sum as $300,000 in the bank in 1881 at any one time, but only $109,289.24.

Q. How large a sum did you have loaned at any one time in 1881?

A. $203,000.

Q. In 1882 how large a sum did you have at any one time on loan?

A. $560,000.

In answer to Mr. DAVIES—recross-examination:

We have been advised on a statement of the facts, by our counsel, that the bullion we deliver at the assay office is at our risk.

96 In answer to Mr. KEELER—redirect examination:

The largest amount of bullion in the assay office at any time in 1881 was $61,055.36; the largest amount of bullion in the assay office in 1882 was $75,540.

Our company pays the Government for assaying its bullion about two per cent. These base bars are brought to New York from Chicago; they are sent here by express, in charge of an express com-

pany, and the express company delivers them at our office; the express company never puts them in the assay office themselves, but they cart them there; some of our representatives attend there at the same time and see that a delivery is actually made at the assay office, and we superintend it; they drive right to our door, and the man comes up and notifies us that the silver is down-stairs, and our man or boy jumps in the wagon and goes to the assay office with it. I do not know the manner of conducting business of other silver mining companies. The great bulk of our silver was sold in the State of New York for the two years ending November 1st, 1882; the majority is brought here rather than sold in Utah and Chicago.

Q. Now the refining that you do in Chicago is the taking of the bars that you get from Utah and reducing them to a degree of fineness?

A. Separating, so far as possible, the lead, silver, and gold.

Mr. Davies, on behalf of defendant, offers in evidence extracts from the books of the company relating to the property on hand of the company within the State of New York during the two years ending November 1st, 1882.

Extracts received and marked in evidence Defendant's Exhibits 4, 5, 6, and 7, respectively.

In answer to Mr. KEELER—redirect examination:

97 Q. Prior to the bringing of this suit did you receive bills from the comptroller's office demanding payment for taxes of 1881, 1882?

A. I cannot remember whether I got those bills or not. All I remember is those large reports to be filled in.

Q. Was it prior to the bringing of this suit that these bills were received?

A. I don't remember when they were received.

Q. They are simply statements of the amounts the comptroller claims to be due at the expiration of each year?

A. Yes.

It is conceded that the bills were received before the commencement of this suit, but they are objected to until the date of their receipt is proved.

Marked for identification Plaintiffs' Exhibits 3 and 4, of this date. (See fols. 521, 524.)

Mr. Davies offers in evidence letter written by himself to Mr. Davenport, the comptroller, dated March 18th, 1882.

Letter received in evidence and marked Exhibit 8 of defendant. (See fol. 526.)

Mr. Davies offers in evidence the answer to the foregoing letter, dated March 20th, 1882.

Received and marked Defendant's Exhibit 9, of this date. (See fol. 531.)

Mr. Davies offers in evidence letter from the comptroller to himself, dated April 4th, 1882.

Admitted and marked Defendant's Exhibit 10, of this date. (See fol. 533.)

Mr. Davies offers in evidence — written by the deputy comptroller on the 8th of April, 1882.

Admitted and marked Defendant's Exhibit 11. (See fol. 536.)

JULIEN T. DAVIES, called as a witness for the defendant, testifies as follows:

98 On March 28th, 1882, I had an interview with the deputy comptroller at Albany on the part of the Horn Silver Mining Company, whose counsel I then was, in the matter of its State taxes, and offered to pay a tax to the State for that company for the year ending November 1st, 1881, based upon a computation of the cash on hand, money loaned, and silver held within the State during that year and upon a computation of the value of the property held by that corporation within the State for that year or upon the business done by the company within the State for that year computed by a valuation of such property. That offer was taken into consideration by the deputy comptroller and was not declined, and until the commencement of this suit I never received a definite answer from the comptroller's office whether or not that offer would be accepted. I took the commencement of this suit as a declination of that offer.

Mr. Davies offers in evidence a letter from deputy comptroller to himself, dated April 29th, 1882, in reply to M. Davies' letter of April 8, 1882.

Received and marked Defendant's Exhibit 12, of this date. (See fol. 539.)

Mr. Davies states as part of his testimony that he never did receive any statement of the conclusion of the comptroller's office until commencement of this suit, if that may be regarded as a statement of conclusion.

Mr. Davies offers in evidence circular dated October 12, 1882, which it is conceded by the plaintiffs was received by the defendant, together with the blank form of report to be made to the comptroller's office for the year ending November 1st, 1882.

Marked for identification Defendant's Exhibit 13. (See fol. 531.)

FRANK G. BROWN, called as a witness on behalf of defendant, being duly sworn, testifies as follows:

99 In answer to Mr. DAVIES—direct examination:

The practice of the United States assay office in delivering to depositors of silver bullion their identical silver is that it will be done by special request, but it is not generally done. The silver is melted up in 8,000-ounce lots, and it is all mixed together in that amount and put into bars. They will give you your identical silver, but it has got to be kept separate.

Mr. Brown testifies that, being shown the circular marked for identification Defendant's Exhibit 13, he remembers having seen that paper in the office of the company, but whether it came from the comptroller's office with the blank forms he cannot say.

I remember seeing it in the office of the company prior to the commencement of this suit—as long as a year ago.

WILLIAM S. HOYT, called as a witness on behalf of defendant, being duly sworn, testifies as follows:

In answer to Mr. DAVIES—direct examination:

I am secretary of the Horn Silver Mining Company and have been secretary since the organization of the company. This matter of the taxation of the company by the State of New York has been in my charge. I have either seen Defendant's Exhibit 13 of to-day or a duplicate of it in our office, I should think, within a year—perhaps as far back as a year; about that time. It came, presumably, from the comptroller's office; it is dated so. I have no further or more definite recollection than that about it.

In answer to Mr. KEELER—cross-examination:

I don't remember whether Plaintiffs' Exhibits 3 and 4, of this date, were received by the company prior to the commencement of this suit. I have no knowledge on the subject further than that I think I recollect the bills as having been at some time at the office.
100 I have no recollection whether they were received prior to the commencement of this suit or not.

In answer to Mr. DAVIES—redirect examination:

The Horn Silver Mining Company did not, to my knowledge, ever receive anything else from the comptroller's office that could be construed into a demand to pay these taxes beside these bills and the formal papers in this suit.

Counsel for the plaintiffs waives all claims on the part of plaintiffs in this action for interest upon the taxes and penalties alleged to be due by the defendant corporation herein to the plaintiffs.

FRANK G. BROWN recalled by the defendant:

In answer to Mr. DAVIES—direct examination:

Our company mines ore in Utah and carries on the manufacturing business of converting that ore into silver bullion, and the manufacturing part of our business is the principal part of the business of our company. The proportion, by way of comparison, which the manufacturing part of our business bears to the mining part is as follows: The best illustration I could give you, I should say, would be in a general way to give about the expenses of the various departments. At our mining proper our expenses are about five hundred dollars per day; at our smelting works in Utah and where we manufacture and put the ore into bullion our expenses are about two thousand dollars per day; in Chicago, where we separate the silver and the lead and make refined lead, our expenses are about a thousand dollars a day. The manufacturing business is thus about six times the mining business.

In answer to Mr. KEELER—cross-examination:

101 We buy very little ore aside from that which we mine and smelt—that is, of the silver ore. We buy fluxing ores and iron ores from other companies. We have in and about the mine at Utah, I should say, on an average, eighty to one hundred men. We have on our pay-roll from one hundred and fifty to one hundred and seventy-five employed in smelting at Utah. This two thousand dollars por day is the sum that we pay the employees and for purchasing ore, fuel, supplies, and the process of transferring the ore into base metal. The pay-rolls of the employees amount to about sixteen to eighteen thousand dollars a month of the whole sixty thousand dollars.

Q. How much of this thousand dollars per day paid in Chicago for smelting represents payment for labor?

A. About six to seven thousand dollars per month. This sum of two thousand dollars a day includes what is paid for the ore which we purchase at the smelting works in Utah, but the thousand dollars a day at Chicago does not represent any sum paid for ores purchased. At Chicago the work done is to refine the baser bullion that we bring from Utah. Our fuel is a very large expense at Chicago, as well as Utah. We use coke from Pennsylvania.

In answer to Mr. DAVIES—redirect examination:

The process at Utah is something similar to iron blast furnaces. The ore and the charge is mixed. The charge consists of the silver or lead ore and iron ore. The flux to carry off the base is composed of iron ore, slag, and such composition ores to mix to make a proper mixture so we can get out the silver and lead. We buy all of those ingredients of the charge except the silver ore. We have to buy everything excepting the silver and lead; they come out of our mines. The daily expense and monthly expense in Uath of our purchase of ingredients for the charge, ineluding fuel and everything that is a part of the charge, would be close to fifteen hundred dollars a day—a thousand to fifteen hundred. It varies, of course.

In Chicago we use coke as fuel. The charge made up
102 in Chicago is not similar to that I have deseribed at Utah. The bullion at Chicago is melted in the furnace and crucibles, and no ingredients are mixed, excepting zinc. We buy zinc in Chicago and melt it. The base bullion and silver having a greater affinity for the zinc than it has for lead it leaves the lead and goes to the zinc, and then we separate the silver from the zinc. We are using about six per cent. of zinc for the charge, the rest being base bullion. The daily expense for the zinc in Chicago is about fifty dollars.

In answer to Mr. KEELER—recross-examination:

Q. Will you explain the process of smelting and of the work done at Utah, and generally the work done at Utah?

A. I will say our mine is located in the southwestern part of Utah, about two hundred and fifty miles southwest of Salt Lake City.

At the mine we simply strike the ore and mine it the same as you would mine coal. That ore after having been taken out of the mine is transported by rail to a point seven miles south of Salt Lake City, at a place called Franklin, where are located our furnaces. We have there five stacks. They are similar to iron blast furnaces. These stacks stand up about thirty feet high, and we have a receptacle of fourteen feet which holds our charges. Of course, we have fires underneath, but the main portion of the fire is used by mixing the coke with the iron ore and with the flue test and these various ingredients that we have to buy and mix to make a proper chemical combination.

That ore, the whole mass, is gradually smelted and runs out in a liquid form. The base is drawn off in the shape of what we call slag, leaving the lead and silver, being heavier, settled at the bottom of the crucible, and that is drawn off from time to time and run out into bars. These bars weigh about ninety pounds each and are about the same as pig-iron bars or just about the same thing as lead bars. They are about twenty-eight to thirty inches in length,
103 I should say, irregular shaped, and coming out to a point so that they can be lifted from the end. That is what we call base bullion. That contains lead and silver and certain impurities that get mixed with it in the smelting operation. We then transport that.

In answer to the referee:

Q. What per cent. of that is silver?

A. Of course, it varies a great deal, depending upon the richness of the ores that we are treating. Bullion will run about one hundred and fifty ounces of silver to the ton of weight, which would make a very small percentage as to weight. It is mostly lead. That is then transported to our refining works in Chicago, Illinois.

In answer to Mr. KEELER—recross-examination:

Q. Be kind enough to describe fully the process of smelting in Chicago.

A. There are various antimony furnaces and lead furnaces, retorts, blast furnaces, etc. It is quite an elaborate process. There we have to separate the silver from this base bullion, and we make what is called the bar silver and refined pig-lead. That is done in Chicago. The lead is all disposed of and sold there and the silver is shipped on to New York for further manufacturing.

In answer to the referee:

Q. Do you know how many processes it goes through with at Chicago—how often it is melted up and combined?

A. It goes through about eight different processes, I guess.

In answer to Mr. KEELER—recross-examination:

104 Q. Can you describe more fully than you have the process of the manner of proceeding at Chicago? Give us the details more.

A. It is first put into what is called an antimony furnace. These bars are just thrown into a large furnace in red heat, melted down, and the impurities gradually come to the surface and are skimmed off to a certain extent. From the antimony furnace it runs to what is called our lead furnace. There it has a further process of refining, and the impurities that are left that can be found are there taken off, so that in the lead furnace we try to get chemically pure lead. The skimmings are all taken off. I should have explained that we put the zinc in this furnace. The zinc takes up the various impurities and picks up the silver and we skim that off, and that goes to the silver baths, and from there it would go to the blast furnace and to retorts, and then to the test furnace, and the impurities that are carried in this base bullion are worked up under various other other treatments.

In answer to Mr. DAVIES—redirect examination:

Q. How long does the process take in the smelting works at Utah—from the time you begin the charge until it comes out base bullion?

A. It takes about six hours, I should say, to go through. Of course, you cannot tell exactly until you start up. We try to keep our works running night and day, year in and year out, including Sundays. The process takes in Chicago from eight to nine days to work the material all the way through. The slag that we get at our smelting works in Utah is all waste value—that is, the refuse and impure properties of the ore is, and the silica in the silver and lead ore and a large proportion of this iron that we have to buy to carry off the flux ore and the impurities is of no value, excepting sometimes if the furnace is not working well we will charge back a little of the slag to loosen out the furnace.

105 In answer to the referee:

Q. What do you get from your refining process in Chicago that is of value?

A. We get lead and silver; that is about all. We make two kinds of lead; we make a refined lead and we can also make a double refined lead, and then we have a lead that is called a hard lead. The main value is in refined lead and silver.

In answer to Mr. DAVIES—redirect examination:

We don't make base bullion in Chicago; we make base silver which is mechantable to a certain extent, but that silver has to go through another process before it becomes refined silver. It would be at a discount in the condition of base silver; this base silver is an article which is very often bought and sold in the market, but not as frequently as the refined silver bars. The usual and customary way in which silver bars are sold in the market is after it has been through the process in the assay office and as fine bars. The process is to generally put the base silver into fine bars and sell the fine bars.

In answer to Mr. KEELER—recross-examination:

Q. You say generally this is done. Do you refer to other companies? What do you mean by the word "generally?"

A. Well, the two classes come right together—the bullion and the refined bars.

Q. Is the process pursued by you similar to that pursued by other mining companies?

A. I don't know, sir, about other companies. There are some mining companies that will dispose of their bar silver just as it is; some companies will make a finer grade of bar silver than others. A great many mining companies will turn out their silver only being fifty per cent. of fine silver; others will make very fine silver from the start, all depending upon the ore and the process.

106 No two companies are alike, sir, in that respect. Our silver bars run all the way from 980–990 degrees of fineness. They vary, of course, unless you go through the full process—going through the assay office and then put up further works for the further treatment of the separation of the gold and silver; it is impossible to make in any other way the standard silver bar 999 fine. The process is rather expensive, and we never built those works for the further completion of that bar silver.

FRANKLIN N. CHASE, called and sworn as a witness for the defendant, testified as follows:

In answer to Mr. DAVIES—direct examination:

I am in the comptroller's office. I had charge in 1881 and 1882 of the corporation tax books, amongst other things; that was my principal work. All circulars prepared and issued from the comptroller's office during those years went through my hands. This circular was prepared in the comptroller's office of the State of New York, under his direction, and was sent out to different corporations in the State of New York. I think it was issued in 1880.

Offered in evidence. Received and marked Defendant's No. 1, December 20th, 1883. (See fol. 545.)

The comptroller at that time was James W. Wadsworth.

Q. This next circular is a circular relating to average of deposits, and I only introduce that as showing that the method I advised should be adopted in arriving at the average of these moneys left on deposit in this State, and that this is the method which has received the sanction of the department.

Witness shown circular dated December 22d, 1881, and asked whether that circular was prepared under the direction of the

107 comptroller of the State of New York, and by his orders was sent to different corporations in the State of New York.

A. Yes, sir. Well, this circular was issued under another law; it has no connection with the corporation tax law.

Only introduced to show the method of arriving at the averages that was adopted.

Received and marked Defendant's Exhibit No. 2, December 20th, 1883. (See fol. 547.)

This circular dated November, 1881, was prepared under the direction of the comptroller, and by his direction sent to the various corporations within the State of New York—to corporations in New York city, I think, exclusively.

Circular offered in evidence. Received and marked Defendant's Exhibit No. 3, December 20, 1883. (See fol. 550.)

The comptroller at the time this Exhibit Number Three was sent out was Mr. Wadsworth. The comptroller's office acted upon the rule laid down in that circular in collecting taxes, so far as the proportion of capital was employed or concerned, but not in regard to the business done. They found it was impossible to do that. The circular was acted upon so far as the amount of capital invested here was concerned, but as to the amount of business done it was not. The companies couldn't furnish the information or did not. We received taxes from foreign corporations based upon calculations that did not include all the capital stock of those companies.

Q. Now state upon what rule you arrived at the tax of these foreign manufacturing companies doing business within this State here.

A. We took their statement.

Q. As to the amount of capital they employed in this State?

A. Yes.

108 Q. And upon that amount did you collect the tax in accordance with law in place of assuming the whole capital as the basis?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. And under whose administration was that rule carried out?

A. Under both Mr. Wadsworth and Mr. Davenport.

Q. And did you accept taxes in January, 1881, and in January, 1882, both, on that principle, from foreign manufacturing corporations?

A. We did; in 1882 and 1883, and I think perhaps a few in 1881. We didn't put it into effect until, I think, about 1881; the tax of 1881 is payable in 1882, so that the first payment was 1882, I think,

Q. And this way that you have stated is the way that under these laws foreign manufacturing companies doing business in the State of New York have been practically taxed by the comptroller. Is that the fact?

A. Yes, sir; the circular dated March 9th, 1882, was issued from the comptroller's office and by his authority, and was sent to corporations that had not made their report, of which we had knowledge, and when corporations made reports in response to that circular we waived any penalty for neglect to make the report.

Offered in evidence. Received and marked Defendant's Exhibit No. 4, Dec. 20th, 1883. (See fol. 553.)

We did not collect the penalties from the corporations who complied with this circular and sent in their reports. The circular dated September 15th, 1882, was issued from the comptroller's office by his direction and sent to the different corporations in the State of New York—to insurance companies, I think.

Offered in evidence. Received and marked Defendant's Exhibit No. 5, Dec. 20th, 1883. (See fol. 555.)

109 The circular marked Defendant's Exhibit, for identification. December 18th, 1883, was prepared under the direction of the comptroller and sent to various corporations in the State of New York, to certain corporations in New York city about the time of its date.

Offered in evidence. Received. Defendant's Exhibit No. 13. (See fol. 541.)

The circular dated December 15th, 1882, was prepared and sent out by direction of the comptroller, at the time of its date, to corporations in the State of New York.

Offered in evidence. Received and marked Defendant's Exhibit No. 6, December 20th, 1883. (See fol. 557.)

We did not exact and collect a penalty from corporations that made their report in response to this circular of December 15th, 1882, if they had sent in their report within the date specified.

Q. (Witness shown circular dated June 6th, 1883.)

A. This circular dated June 6th was prepared and sent out, under the direction of the comptroller, to these different corporations in the State.

Offered in evidence. Received and marked Defendant's Exhibit No. 7, Dec. 20th, 1883. (See fol. 559.)

No penalty was exacted or collected from the corporations who made payment of the tax in response to that circular. This circular dated December 10th, 1883, was prepared and sent out by direction of the comptroller.

Offered in evidence. Received and marked Def't's Ex. No. 8, December 20th, 1883. (See fol. 563.)

110 We did not collect and receive any penalty from the corporations who complied with the requests of that circular.

Defendant offers in evidence opinion of the attorney general of the State of New York, dated November 14th, 1882, to Hon. Ira Davenport, comptroller of the State of New York. Received. Def't's Ex. No. 9, Dec. 20th, 1883. (See fol. 565.)

This opinion was received at the comptroller's office from the attorney general. The circular of the comptroller's office referred to in this opinion is the circular of October 12th, 1883, Def't's Ex.

13. These various circulars that have been put in evidence were prepared—probably half a dozen of them—by Mr. Wadsworth during his term of office, and after his term of office Mr. Gallien and Mr. Davenport prepared them together. I remember the decision of the Standard Oil case in Pennsylvania. It was brought to my attention by Mr. Gallien a few days after it was published.

Opinion offered in evidence. Objected to as immaterial and incompetent. Excluded by the referee. Exception.

In answer to Mr. KEELER—cross-examination:

The purpose of sending these various circulars was to hurry up the companies and get the reports and get the taxes, and to induce them to pay the taxes without litigation. Plaintiff's Exhibit No. 3, for identification, December, 1883, in the Horn Silver Mining case, emanated from the comptroller's office. Exhibit No. 3 was sent out between the 3d and 10th of January, 1882, and Exhibit No. 4 between the 3d and 10th of January, 1883.

Witness shown papers marked, for identification, Bassick case, Plaintiff's Exhibits Nos. 4 and 5.

111 These papers were sent out from the comptroller's office. No. 4 was sent out between the 3d and 10th of January, 1882, and No. 5 the same date, 1883. They were sent to the various corporations to whom they were addressed. Similar bills were sent out to the St. Joseph Lead Company at the same time.

Mr. Keeler offers them in evidence and asks that they be marked as exhibits. Received and marked Horn Silver Company, Plaintiffs' Exhibits Nos. 3 and 4; and, in the Bassick case, Plaintiff's Exhibits Nos. 4 and 5.

It is admitted that the Horn Silver case was commenced on June 26th, 1883; the Bassick case on June 25th 1883, and the St. Joseph Lead Company case on the 29th day of June, 1883.

In answer to Mr. DAVIES—redirect examination:

All of these bills are in my own handwriting. I made a memorandum on the ledger of the dates between which they were sent out, with regard to all companies; they were all sent out at that time. I sent out bills at the same time for a great number of corporations, nearly a thousand; I did it in just about a week. I have no means of stating when these were sent out, further than that they were sent out, some half a dozen bills, and I have a general memoranda that a thousand bills were sent out during these dates. I never sent to any of these companies any bills for penalty on any of these taxes. I do not recollect ever adding anything in the way of assessing the penalty against these companies. I have assessed a penalty against a company.

I presume we did it by adding the penalty to the amount of our tax and put it on the bill and sent the bill to the company. I never

make an assessment penalty in any way other than that. I
112 have had charge of this whole matter of the books and of sending out the bills.

In answer to Mr. KEELER—recross-examination:

I noted upon some book every date that I sent out a bill to a specific company. I have a book in which I open an account with each specific company. I didn't keep the date of the sending out of the bills. I kept the date of the receipt of the cash. I recollect that these bills were sent out between the dates that I have named and to these companies. The circular of March 9th, 1883, was sent from our office to all the companies who were in default at that time, I should say. It is a circular issued to the companies who have made a default in the payment, but not in the report; they had made their report, but had not paid the tax.

Offered in evidence by Mr. Keeler. Objection made on the ground that it has not been proved it was sent to the company.

It was sent to the companies that had not paid their tax; it was sent out generally at the time it is dated or within a day or two of that date.

Objection overruled. Received. Exception by Mr. Davies. Marked Plaintiffs' No. 1, Dec. 20th, 1883.

I am not able to say that that circular of March 9, 1883, was sent to the defendants in these suits otherwise than from my general impression that it was sent to all the companies that had not paid their tax. We received, as a rule, from the companies who paid the taxes in response to that circular the taxes without collecting penalty. There are ledger accounts against the company in the comptroller's office with reference to these taxes. No penalties have been entered in those accounts against these companies.

113 In answer to Mr. KEELER—recross-examination:

—. All the penalties are entered in the books that have been collected in which penalties were collected or the penalties entered in the books after collection?

A. Yes, sir; that is what I mean in each case.

Q. Not before?

A. No, sir. This circular dated Albany, March 9th, 1882, emanated from the office of the comptroller of the State of New York and was sent to all companies in default at that date. The Horn Silver Mining Company and the Bassick Company were in default at that date for the year 1881. We had opened an account with them in which we had charged them with taxes. The circular was sent out about its date, within a day or two.

Offered in evidence. Objected to on the ground that it has not been proved that it was sent to these defendants. Objection overruled. Exception taken. Received and marked Plaintiffs' Exhibit No. 2, Dec. 20th, 1883.

They were mailed to all the various companies in an envelope postpaid and addressed to them at their post-office addresses. The other circulars were sent in the same way—*i. e.*, through the post office.

In answer to Mr. DAVIES—redirect examination:

I think I mailed those circulars myself. It is my practice to mail letters from the office. I do not stamp them. I put them in the envelopes and the messenger stamps them. I have no doubt I mailed them myself.

In answer to Mr. KEELER—recross-examination:

The circulars concerning which Mr. Davies has asked me were sent in the same manner as these others.

In answer to Mr. DAVIES—redirect examination:

114 I have no means of stating that this circular of 1882 was sent to these defendants other than my general statement that they were sent to all the companies that had not paid the tax.

In answer to Mr. KEELER—recross-examination:

Q. Mr. Chase, in point of fact, were any penalties ever added to the bills, or was it not the fact that these penalties were collected, except in the voluntary instances you have mentioned, by suit brought?

A. Yes, sir.

Q. In these cases which you have mentioned as voluntary were not suits brought?

A. I think not; no, sir. In two or three instances companies voluntarily paid the penalty for non-payment of taxes. I don't recollect the names, but they were small concerns. I think the amount of the penalty was less than ten dollars.

In answer to Mr. DAVIES—redirect examination:

These were not foreign manufacturing companies doing business within this State. One was a mining company doing business in this State. I don't recollect the other. They were all domestic corporations.

Mr. DAVIES testifies as follows:

I would like, if the court please, to have added to my statement that in the latter part of December, 1882, I had an interview with Mr. Gallien, in which he handed me a copy of the opinion of the attorney general of November 14th, 1882, and a copy of the circular of October 12th, 1882, and I was at that time attorney for these corporations.

Mr. Davies offers to show, as a matter of fact, that during the years 1881, 1882, and 1883 the statutes upon which these actions

were based were undergoing judicial construction in actions
115 brought by the attorney general substantially as test suits to settle the construction of the statutes.

Objected to as immaterial and incompetent. Objection sustained. Exception by Mr. Davies.

The testimony here closed.

The referee thereupon granted to the defendant time to submit, pursuant to section 1023 of the Code of Civil Procedure, a statement in writing — the facts which it deemed established by the evidence and of the rulings upon questions of law which it desired the referee to make.

Such statement was thereupon duly submitted to the referee, and will be found, together with the ruling of the referee upon each proposition submitted noted therein, annexed to judgment-roll, and which is hereby made a part of this case.

The referee thereupon made and filed his decision in writing, a copy of which will be found annexed to judgment-roll and which is hereby made a part of this case.

Thereupon the defendant duly filed and served its exceptions or notice of exceptions to said rulings of the court and to said decision, which will also be found annexed to said judgment-roll and which is hereby made a part of this case.

DAVIES, COLE & RAPALLO,
Attorneys for Defendant, 32 Nassau Street, New York.

PLAINTIFFS' EXHIBIT 1. Dec. 18, 1883. (Annexed to complaint.)

116 PLAINTIFFS' EXHIBIT 2. Dec. 18, 1883. (Annexed to complaint.)

DEFENDANT'S EXHIBIT 1. Dec. 18, 1883.

Articles of Incorporation of The Horn Silver Mining Company.

This agreement, made and subscribed this 17th day of February, A. D. 1879, witnesseth: That the undersigned, parties hereto, do hereby associate ourselves together to establish and conduct the business of mining in Grampion precinct, San Francisco mining district, Beaver county, Utah Territory, and such other business and at such other places as is hereinafter mentioned, and to become a body corporate under and in compliance with the provisions of the act of the Governor and Legislative Assembly of said Territory, entitled "An act providing for incorporating associations for mining, manufacturing, commercial, and other industrial pursuits," approved February 18, 1870, as amended by the act of February 20th, 1874, and we hereby agree, certify, and declare as follows:

I.

The name of this association and body corporate shall be the Horn Silver Mining Company.

II.

The principal place of business of this corporation shall be at Frisco, in the county of Beaver and Territory of Utah, and offices for the registry and transfer of stock, for paying dividends, and for general financial purposes may be established at any place or places in the United States or Territories by the directors of the company.

117

III.

The names and respective places of residence of the subscribing associates and incorporators written in full are as follows:

Allen G. Campbell, Frisco, Beaver Co., Utah.
Matthew Cullen, Frisco, Beaver Co., Utah.
Augustus Byram, Atchison, Kansas.
Dennis Ryan, Frisco, Beaver Co., Utah.
Frank G. Brown, city & State of New York.
Charles G. Francklyn, city & State of New York.
James Ryan, Frisco, Beaver Co., Utah.

IV.

The time of the duration of this corporation shall be twenty-five (25) years.

V.

The business and pursuits to be carried on by the corporation are buying, selling, leasing, and operating mines and mining claims in the Territory of Utah, and smelting, reduction, and refining works in said Territory or elsewhere; conducting a general mining, milling, and smelting business in all its branches, including buying and selling mineral ores and bullion; carrying on a general mercantile business by buying and selling such goods, merchandize, stores, and miners' supplies as are usually kept in and required by the wants of a mining camp or settlement; building and operating all such roads, tramways, and transportation routes as may be convenient in transporting the products of its business or procuring supplies; purchasing, hiring, and holding all such real and personal property, wherever situate, as may be required in carrying on any of its business, and, when no longer required for business purposes, leasing, selling, or exchanging the same, and generally
118 to do all acts and things incidental to a general mining business or to any of the aforesaid pursuits.

VI.

The capital stock of this corporation is fixed and established at ten million (10,000,000) dollars, divided into four hundred thousand (400,000) shares of the denomination and par value of twenty-five (25) dollars each.

VII.

Each of the subscribers hereto has subscribed for and taken the

number of shares of said capital stock set opposite to his name, to wit:

Allen G. Campbell, forty thousand (40,000) shares.

Matthew Cullen, forty thousand (40,000) shares.

Augustus Byram, forty thousand (40,000) shares.

Dennis Ryan, forty thousand (40,000) shares.

Campbell, Cullen & Co., trustees, forty thousand and one (40,001) shares.

Campbell, Cullen & Co., one hundred and ninety-nine thousand nine hundred and sixty-nine (199,969) shares.

Frank G. Brown, ten (10) shares.

Charles G. Francklyn, ten (10) shares.

James Ryan, ten (10) shares.

VIII.

This corporation being primarily formed for the immediate purpose of working and developing the estate, property, and premises known as the Horn silver mine and the treatment and reduction of the ores and metals therein contained and the sale and exchange of the product, and carrying on in connection therewith the general mining business hereinbefore more particularly described, the cash valuation of the estate, premises, and mining property hereinafter described has been fairly estimated at ten million
119 (10,000,000) dollars; and the parties hereto have agreed, and do hereby agree, that the same shall be conveyed to and received by said corporation in full payment for the capital stock thereof taken by the parties hereto in the proportions aforesaid, and such stock subscriptions shall not be payable in cash, and said parties shall be deemed to have subscribed and paid in their respective *pro rata* amounts for said stock by making and procuring conveyances of said mining property and premises, with the appurtenances, by the owners thereof by proper deeds of conveyance, duly executed and delivered, so that the same and the title thereto may rest forthwith in said corporation, the Horn Silver Mining Company, on its becoming a corporation.

The said premises, estate, and mining properties are described as follows: That real estate and mining property situate in the Territory of Utah, to wit, the Horn Silver mine and mining claim, situate in San Francisco mining district, county of Beaver, and consisting of 1,440 lineal feet along the ledge and the surface ground located and held therewith; the Campbell, Cullen & Co. smelting works, comprising three (3) furnaces; the Grampion mill site, containing five (5) acres, and on which said smelting works are situated, and the Horn Silver mill site adjoining and containing five acres, all situated in Beaver county and said mining district; also the Mountain King iron mine, in Beaver Lake mining district, in said Beaver county; also two fire-proof store buildings and the lots on which they stand, each lot being 50 by 100 feet, situate in Frisco, Beaver county; also a barn and corral in Frisco, a stable and boarding-house at the Horn Silver mine; two spans of horses, with wagons and harness, used in the mining business of

Campbell, Cullen & Co.; four coal kilns at Wah Wah; three coal kilns at Coalville, known as Rowley mills; two coal kilns at Coalville, known as the Myers' kilns, and generally the mining and smelting tools, implements, machinery, fixtures, plants, and outfits owned and used by Campbell, Cullen & Co. in their mining and smelting business, excepting and reserving the stocks of
120 goods, wares, and merchandise in the store buildings and kept for sale as merchandise.

Also the following described property, situate in the city of Chicago, county of Cook and State of Illinois, to wit:

The leasehold interest of the said Campbell, Cullen & Co. in and to block three (3), in the Canal Addition to the city of Chicago, under a lease from Francis A. Russell, dated October 29th, 1878, subject to the payment of the rent reserved and the performance of all the conditions of said lease obligatory in the leases; also the buildings on said leasehold property and the engine, blower, tools, implements, furnaces, fixtures, machinery, and plant owned and used by Campbell, Cullen & Co. in and about their business of separating and refining metals and bullion on said premises—

Excepting and reserving to Campbell, Cullen & Co. all ores and bullion on hand at Frisco or Chicago or in course of transportation from Frisco to Chicago at this date.

IX.

(Omitted as unnecessary.)

X.

(Omitted as unnecessary.)

XI.

Directors shall be elected at a general annual meeting of the stockholders to be held on the first Tuesday of October, 1879, and annually thereafter at Frisco, in the county of Beaver aforesaid, but the place of holding the annual meeting may be changed to Salt Lake City, Utah, by the stockholders at an annual meeting or by by-law or by the board of directors.

* * * * * * *

121 XII.

(Omitted as unnecessary.)

XIII.

(Omitted as unnecessary.)

XIV.

Meetings of the board of directors may be held at Frisco aforesaid or in Salt Lake City, Utah, or at such other place or places in the United States as the directors may prescribe. Meetings of the board may be called by the president, or, in his absence, by the vice-president, or, in the absence of both, by any two directors.

XV.

(Omitted as unnecessary.)

In witness whereof we have hereto set our hands and seals the day and year aforesaid.

ALLEN G. CAMPBELL. [SEAL.]
DENNIS RYAN. [SEAL.]
AUGUSTUS BYRAM. [SEAL.]
MATTHEW CULLEN. [SEAL.]
FRANK G. BROWN. [SEAL.]
JAMES RYAN. [SEAL.]
CHARLES G. FRANCKLYN. [SEAL.]

In presence of—

—— ——.

122 TERRITORY OF UTAH, } ss:
Salt Lake County, }

On this — day of February, A. D. 1879, before me, Elias Smith, probate judge in and for said county of Salt Lake, in the Territory of Utah, personally came Allen G. Campbell, Matthew Cullen, Augustus Byram, and Dennis Ryan, who are personally known to me to be four of the persons described in and who subscribed the foregoing articles of incorporation of the Horn Silver Mining Company, and each for himself acknowledged that he made, subscribed, and executed said articles freely and voluntarily and for the uses and purposes therein mentioned; and the said Allen G. Campbell, Matthew Cullen, Augustus Byram, and Dennis Ryan, being each for himself duly sworn, did depose and say that he is one of the persons subscribing said agreement of association; that it is his *bona fide* intent to commence and carry on the business mentioned in the said agreement, and that he verily believes each of the associates named in said agreement and who has subscribed the same is able to pay and will pay the amount of his stock subscribed by making or procuring — made to said corporation deeds of conveyance of the estate, premises, and mining property in said agreement described immediately upon the completion of the organization of said corporation.

E. SMITH,
Probate Judge.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

To D. Bockholt, clerk of the probate court, Salt Lake Co.:

Having carefully examined the record in the case of incorporation of the association known by the name and style of the Horn Silver Mining Company and finding that the law in said
123 case has been complied with, you are hereby directed to issue under the seal of said court, in due form, the certificate of incorporation, without delay, directed to the association known by the name and style of the Horn Silver Mining Company.

Witness my hand this 20th day of February, A. D. 1879.

E. SMITH,
Probate Judge.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

To the Horn Silver Mining Company:

I, the undersigned, clerk of the probate court for said county, under and by the direction of Hon. E. Smith, probate judge for said county, do hereby certify that "The Horn Silver Mining Company" has filed in my office the agreement of incorporation, together with the oath of office and bonds of the officers, as required by the statute of Utah, and said company is hereby authorized and empowered to transact all the functions and enjoy all the privileges of a corporation.

In witness whereof I hereunto set my hand and affix the seal of said court this 20th day of February, A. D. 1879.

[SEAL.] D. BOCKHOLT,
Clerk Probate Court, Salt Lake Co., U. T.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I approve of the issuance of the foregoing certificate.

E. SMITH,
Probate Judge.

124 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, D. Bockholt, clerk of the probate court in and for the county of Salt Lake, in the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the articles of incorporation, order, and certificate of the Horn Silver Mining Company, as appears of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 10th day of October, A. D. 1883.

[SEAL.] D. BOCKHOLT,
Probate Clerk.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, E. Smith, judge of the probate court, the same being a court of law and record within and for the county and Territory above named, do hereby certify that D. Bockholt is clerk of said court and was such clerk, duly elected and qualified, at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof I have hereunto set my hand this 10th day of October, 1883.

[SEAL.] E. SMITH, *Judge.*

125 DEFENDANT'S EXHIBIT 2. December 18, 1883.

(No. 8 F.)

Silver bullion receipt.

No. 1804.

ASSAY OFFICE OF THE
UNITED STATES,
NEW YORK, *Dec.* 17*th*, 1883.

Received from W. S. Hoyt, sec't'y, a deposit of silver bullion for bars, weighing eighty-one hundred and ninety-two $\frac{00}{100}$ ounces, the net value thereof to be ascertained and paid to said depositor, or order.

SAM. H. GRAHAM.
For Superintendent.

Ozs., 8,192^{00}.

126 DEFENDANT'S EXHIBIT 3. December 18, 1883.

No. 1759. No. 43 C.

Memorandum of Silver Bullion Deposited at the United States Assay Office, at New York, on the 10 *Day of Dec.*, 1883, *by W. S. Hoyt, Sec'y.*

NOTE.—This memorandum is for the information of the depositor and is of no other value.

Description of bullion.	Weight.				Silver.			Gold.			Deductions.		Net value.	
	Before melting.		After melting.		Fineness.	Value @ $1 4/11 per st. oz.		Fineness.	Value.					
	Ounces.	Dec.	Ounces.	Dec.	1,000ths.	Dollars.	Cts.	1,000ths.	Dollars.	Cts.	Dollars.	Cts.	Dollars.	Cts.
Utah bars	10,526	00	3,974 3,925 2,612	00 00 00	991½ 992 992	4,378 7,205	00 19	½	108	63	115	63	11,576	19

Payable as follows:

Silver bars	$11,467	57
Gold bars	$	
Silver coin	$	
Gold coin	$ 108	62

P. V. R. VAN WYCK,
For Superintendent.

Fine silver oz. 10,330.91+23 fine 999.

127 DEFENDANT'S EXHIBIT 4. December 18, 1883.

Nov. 1, '80, to Nov. 1, '81.

Monthly average	cash on hand	$29,188	63
" "	loans " "	50,250	
" "	silver " "	26,641	94
" "	Total	$106,080	57

Nov. 1, '81, to Nov. 1, '82.

Monthly average	cash on hand	$40,345	65
" "	loans " "	287,407	14
" "	silver " "	51,555	41
" "	Total	$379,308	20

128 DEFENDANT'S EXHIBIT 5. December 18, 1883.

Silver on Hand in U. S. Assay Office, N. Y., at End of Each Month, Nov. 1, 1880, *to Nov.* 1, 1882.

	Nov. 1, 1880, to Nov. 1, 1881.	Nov. 1, 1881, to Nov. 1, 1882.
November	$10,667 22	$75,540 40
December	30,267 99	34,755 94
January		72,562 80
February	9,617 61	37,417 03
March	4,267 71	35,422 77
April	31,096 63	52,559 21
May	19,477 80	74,490 09
June	45,185 56	33,803 57
July	52,310 81	74,487 75
August	12,305 97	59,482 07
September	61,055 36	57,467 85
October	43,450 62	10,675 49
Totals	$319,703 28	$618,664 97
Monthly average	$26,641 94	$51,555 41

129 DEFENDANT'S EXHIBIT 6. December 18, 1883.

Cash on Hand at End of Each Month, Nov. 1, 1880, to Nov. 1, 1882.

	Nov. 1, 1880, to Nov. 1, 1881.	Nov. 1, 1881, to Nov. 1, 1882.
November	$6,699 59	$12,421 02
December	3,902 63	56,921 54
January	4,616 18	49,018 27
February	8,457 08	3,696 03
March	19,153 85	82,395 87
April	4,320 49	75,220 62
May	7,533 57	5,198 90
June	3,211 80	5,051 25
July	16,654 73	142,290 94
August	80,127 80	2,049 97
September	109,289 24	870 79
October	76,296 64	51,012 62
Totals	$340,263 60	$484,147 82
Monthly average	$29,188 63	$40,345 65

130 DEFENDANT'S EXHIBIT 7. December 18, 1883.

Loans Due Company at End of Each Month, Nov. 1, 1880, to Nov. 1, 1882.

	Nov. 1, 1880, to Nov. 1, 1881.	Nov. 1, 1881, to Nov. 1, 1882.
November	$27,000	$88,000
December	47,000	150,500
January	47,000	285,500
February	47,000	201,500
March	37,000	228,500
April	37,000	380,000
May	47,000	259,943 75
June	104,000	283,943 75
July		284,143 75
August		290,618 15
September	7,000	435,618 15
October	203,000	560,618 15
Totals	$603,000	$3,448,885 70
Monthly average	$50,250	$287,407 14

131 PLAINTIFFS' EXHIBIT 3. Dec. 18, 1883.

(Return this, with check, in payment of amount due the State to comptroller.)

Horn Silver Mining Co., 44 Wall St., N. Y., in account with the State of New York, Dr.

For tax on franchise or business based on value of capital stock, per chap. 361, Laws of 1881, for the year ending the first day of November, 1881, as per report filed.

Appraised value of capital stock, $5,000,000.

Tax, 1½ mills $7,500 00

Due State $7,500 00

$ —. TREASURER'S OFFICE, STATE OF NEW YORK,
ALBANY, —— —, 188–.

Received from the — Company — $\frac{}{100}$ dollars in full for above tax on franchise or business.

—— ——, *Treasurer.*

—— ——, *Comptroller.*

PLAINTIFF'S EXHIBIT 4. Dec. 18, 1883.

(Return this, with check, in payment of amount due the State to comptroller.)

Horn Silver Mining Co., 44 Wall —, N. Y., in account with the State of New York, Dr.

For tax on franchise or business based on dividends on capital stock, per chap. 361, Laws of 1881, for the year ending the first day of November, 1882, as per report filed.

132 Dividend, 12 per cent., on capital stock of $10,000,000.

Tax, 3 mills (one-quarter mill for each one per cent. of div'd) $30,000 00

$ —. TREASURER'S OFFICE, STATE OF NEW YORK,
ALBANY, —— —, 188–.

Received from the above-named company — $\frac{}{100}$ dollars in full for above tax on franchise or business on basis of dividends declared.

—— ——, *Treasurer.*

—— ——, *Comptroller.*

DEFENDANT'S EXHIBIT 8. December 18, 1883.

Julien T. Davies. J. Henry Work. James McNamee. Edward B. Hilton. U. S. Grant, Jr. Charles McNamee.

UNITED BANK BUILDING, WALL ST. & BROADWAY,
NEW YORK, *March* 18, 1882.

DEAR SIR: In the case of the Horn Silver Mining Company and

the Bassick Mining Company returns have been duly made, as required by law, for the purposes of State taxation. The companies have received notices from you that unless the taxes are paid by the 20th of March that they will be put in course of collection.

I am desirous of seeing you and endeavoring to arrange a settlement for these companies before litigation is instituted. Will it be possible for you to allow the matter to remain in its present condition for a short time, until I have an opportunity to come to
133 Albany to see you on the subject? I would prefer not to make a special journey to Albany on this account, but if it is essential that I should see you at once with respect to these companies I will come to Albany within the coming week. Unless there is some necessity for pressing these companies I will be greatly pleased if you will allow the matter to remain for about thirty days, during which time I will certainly call upon you.

The returns were made by my advice and the companies have no desire to embarrass you in the administration of the laws, but they are desirous of not paying more taxes than we think we can convince you we ought to pay under the statutes.

I remain truly yours, JULIEN T. DAVIES.

Hon'ble Ira Davenport, comptroller, Albany, N. Y.

DEFENDANT'S EXHIBIT 9. December 18, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *M'ch* 20, 1882.

Julien T. Davies, Esq., cor. Wall & Broadway, New York.

DEAR SIR: Your favor of the 18th is received. It is the wish of this department to avoid litigation where possible and to extend every reasonable favor to corporations affected by the new tax law—chap. 361, Laws of 1881. We will therefore grant the extension of time asked for in the matter of the Horn Silver Mining Co. and the Bassick Mining Co.

Yours respectfully, HENRY GALLIEN,
Deputy Comptroller.

134 DEFENDANT'S EXHIBIT 10. December 18, 1883.

Address all communications on official business to the comptroller.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *April 4th*, 1882.

Julien T. Davies, Esq., New York.

DEAR SIR: Referring to our recent interview at this office touching the tax claimed to be due from the Horn Silver Mining company under act, chapter 361, Laws of 1881, I regret to inform you that I was unable to present the question to the comptroller previous to his departure from this city on Friday last for a warmer

clime and for restored health, as is hoped. The matter referred to is of so much importance to the State as well as your clients that I do not fell warranted in deciding the question during Mr. Davenport's absence, but will add that no proceedings will be instituted or penalty imposed without due notice being first given the company.

Yours respectfully, HENRY GALLIEN,
Deputy Comptroller.

DEFENDANT'S EXHIBIT 11. December 18, 1883.

Julien T. Davies. J. Henry Work. James McNamee. Edward B. Hilton. U. S. Grant, Jr. Charles McNamee.

UNITED BANK BUILDING, WALL ST. & BROADWAY,
NEW YORK, *April* 8, 1882.

MY DEAR SIR: I have yours of the 4th inst., and am
135 obliged to you for the considerate manner in which you treat the case of the Horn Silver Mining Company.

Does not the decision of the Standard Oil Co. case leave you free to dispose of the Horn Silver Mining Co. case immediately and favorably to our views?

We would be glad to pay the taxes upon the basis suggested by me and close the matter up at an early day.

Truly yours, JULIEN T. DAVIES.
B.

Hon. Henry Gallien, dept. comptroller, Albany, N. Y.

DEFENDANT'S EXHIBIT 12. Dec. 18, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *April 29th*, 1882.

Julien T. Davies, Esq., New York.

DEAR SIR: Referring to yours of 8th inst., we have been in conference with the attorney general touching the question involved in the case of the Horn Silver Mining Company, and hope to be able to reach a conclusion in a fow days.

Yours respectfully, HENRY GALLIEN,
Deputy Comptroller.

136 DEFENDANT'S EXHIBIT 13. Dec. 18, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *October 12th*, 1882.

To the proper officer of the company.

DEAR SIR: After consultation between this department and the department of finance of New York city, your company (as per address on accompanying envelope) has been deemed subject to taxation under chap. 361, Laws of 1881. The New York city assessors

will, therefore, exempt your personal property in that city from taxation for State purposes.

I trust you will promptly comply with the provisions of the act mentioned, a copy of which is sent you to-day, and also a blank for report. The report should be made by Nov. 15 proximo, and the tax will be due January 15, 1883.

After a careful consideration of the provisions of section 3 of the act, I shall hold that a fair interpretation demands that corporations not organized under the laws of this State, but doing a portion of their business within this State, shall pay a tax to this department based upon the proportionate amount of their capital employed within this State, the amount of business done within the State to be taken into consideration in arriving at the proportionate amount of capital thus employed. In making your report please state the total amount of capital of the company as well as the amount employed in this State.

Yours respectfully,

—— ——,
Comptroller.

137 DEFENDANT'S EXHIBIT No. 1. Dec. 20, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, —— —, 188–.

In order that I may be able to act intelligently in the execution of the provisions of act, chapter 542, Laws of 1880, so far as they may apply to your corporation, will you please favor me, at your earliest convenience, with a statement of the character of the business in which your company is engaged?

If yours is a manufacturing company, please advise us where you manufacture.

Yours respectfully,

—— ——,
Comptroller.

DEFENDANT'S EXHIBIT No. 2. Dec. 20, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *December* 22, 1881.

To —— ——:

Enclosed you will receive copy chapter 477, Laws of 1881, which requires "every corporation, company, or joint-stock association created under the laws of any other State or country" to make a verified return to the comptroller on or before the first day of February of each year, "in which return shall be set forth the amount of the State tax to and for which they are liable and of the average of deposits in and of moneys received and used in or on account of such business in this State," and to pay a tax thereon of one-half of one per cent.

In arriving at the average of such sums you will please observe the following instructions, to wit: Add the daily net balance of deposits and of receipts from your home office, divide the total by

the number of business days in the year and the quotient
138 will be the sum upon which the tax of one-half of one per cent. will be due.

The report due on or before the first of February, 1882, should cover the transactions of the year ending with the 31st of December, 1881.

Respectfully yours,

——— ———,
Comptroller.

DEFENDANT'S EXHIBIT No. 3. Dec. 20th, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *November* —, 1881.

DEAR SIR: Yours of — is received. It will be noticed that the tax imposed by act, chapter 361, Laws of 1881, is due on the franchise or business of corporations. After a careful consideration of the provisions of section 3 of the above-mentioned act I shall hold that a fair interpretation demands that manufacturing corporations not organized under the laws of this State, manufacturing without this State but doing a portion of their business within this State, shall pay a tax to this department based upon the proportionate amount of their capital employed within this State, the amount of business done within the State to be taken into consideration in arriving at the proportionate amount of capital thus employed. In making your report please state the total amount of capital of the company as well as the amount employed in this State.

Yours respectfully,

——— ———,
Comptroller.

139 DEFENDANT'S EXHIBIT No. 4. Dec. 20th, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *March 9th*, 1882.

Corporation tax department.

To the proper officer of the company:

SIR: About the 1st of November, 1881, this department mailed to your company a copy of chapter 361, Laws of 1881, known as the new corporation tax law, and also the necessary blanks for making the report required by said act, but no response has yet been received. It is not the wish of the department to institute legal proceedings if it can be avoided, and though the time for making the report has passed the penalty for neglect will be waived, provided the report is received within ten days. I trust you will give the matter your immediate attention.

Respectfully yours,

IRA DAVENPORT,
Comptroller.

DEFENDANT'S EXHIBIT No. 5. Dec. 20th, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *Sept.* 15, 1882.

To the secretary of the —:

Your report of gross premiums for the year ending June 30th, 1882, and the tax due thereon, as provided by chapter 361, Laws of 1881, have not yet been received by this department. By making such report and paying the tax by the 25th instant you will save costs and the penalty provided by the law.

Respectfully yours, IRA DAVENPORT,
Comptroller.

140 DEFENDANT'S EXHIBIT No. 6. Dec. 20th, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *Dec. 15th*, 1882.

To the company named on accompanying envelope:

Your report of dividends and appraisement for the year ending Nov. 1st, 1882, as required by chapter 361, Laws of 1881, has not yet been received by this department. By making such report by the 27th inst. you will save costs and the penalty provided by the law. Blanks for making report were sent you about Oct. 20th. If they were not received, others will be sent on application.

Respectfully yours, IRA DAVENPORT,
Comptroller.

DEFENDANT'S EXHIBIT No. 7. Dec. 20th, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *June 6th*, 1883.

To the treasurer of the — company.

DEAR SIR: We send you herewith a copy of the opinion of the supreme court, given at a general term held in Albany in January, 1882, in the case of The People *vs.* The National Fire Insurance Company, in which it is held that under chapter 542, Laws of 1880, the first tax on premiums should be for the six months ending June 30, 1880, and on capital for the year ending November 1, 1880. The principle involved in that decision has recently been confirmed by the court of appeals of the State, Andrews, J. (all the judges concurring), in the case of The People *vs.* The Spring Valley Hydraulic Gold Company.

Under these decisions there becomes due from your company a tax on earnings for the five months ending May 31, 1880, and
141 on capital for the seven months ending May 31, 1880 (or, more strictly, for seven-twelfths of the year ending November 1, 1880), as per account enclosed.

When this department accepted the tax for the fraction of the term from June 1, 1880, it did so "on account" and with the understand-

ing that should the courts decide the point in favor of the State we should claim the balance of the tax.

We trust that under the decisions referred to you will promptly remit the amount as per enclosed statement. The question of interest has received consideration; but, in view of all the circumstances of the case, the department will waive the payment of interest if the tax is paid by the 20th inst.

Yours respectfully, IRA DAVENPORT,
Comptroller.

DEFENDANT'S EXHIBIT No. 8. Dec. 20th, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *Sept.* 10, 1883.

To the secretary of the — :

Your report of gross premiums for the year ending June 30th, 1883, and the tax due thereon, as provided by chapter 361, Laws of 1881, have not yet been received by this department. By making such report and paying the tax by the 25th instant you will save costs and the penalty provided by the law.

This circular is sent by courtesy and not by any requirement of law. The act requiring the report has now been in operation three years, and this department will hereafter strictly exact the penalty for non-compliance with its provisions.

Respectfully yours, IRA DAVENPORT,
Comptroller.

142 DEFENDANT'S EXHIBIT No. 9. Dec. 20th, 1883.

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY GENERAL,
ALBANY, *Nov.* 14, 1882.

The Hon. Ira Davenport, comptroller of the State of New York.

DEAR SIR: I am in receipt of your communication of this date enclosing a letter from Mr. Charles A. Marsh and a circular from your department in regard to the collection of taxes under chap. 361, Laws of 1881.

You desire my opinion whether your department is authorized to require a report and collect a tax under the act of 1881 from the corporation represented by Mr. Marsh, and whether the decision of the court of appeals in the case of The Parker Mills *vs.* The Commissioners of Taxes, 23 N. Y., 242, cited by Mr. Marsh in opposition to your proceeding, has any bearing upon the act of 1881. The decision cited by Mr. Marsh interprets chapter 37, Laws of 1855, relating to the assessment and collection of certain taxes within this State..

That act provided that all persons and associations doing business within this State, though not residents thereof, should be assessed and taxed on all sums invested by them in business within this State the same as if they were residents thereof. The court of appeals

held that the goods of non-residents sent to this State for purposes of sale without reinvestment of the proceeds within this State were not liable to taxation under the provisions of that act.

Section 3 of chap. 361, Laws of 1881, provides that every corporation, &c., organized under the laws of this State or any other State or country and doing business within this State shall be subject to and pay a tax upon its corporate franchise or business into the treasury of the State annually, to be computed in a certain manner.

You will observe that the tax imposed by chap. 37, Laws of 1855, was a tax upon tangible property, whereas that imposed by
143 the act of 1881 is imposed upon intangible property—*i. e.*, corporate franchises or business. Tangible property is taxed where it has a permanent existence and not where it may be transiently found. It was because the tax imposed by the act of 1855 was a tax upon tangible property and because the property was only transiently within this State that the court of appeals in the case cited by Mr. Marsh held that the corporation was not subject to taxation within this State.

Bringing goods within this State and selling them therein is doing business within this State. The tax imposed by the act of 1881, being a tax upon the privilege of doing business and not a tax upon tangible property, is therefore property leviable and assessable against the corporations and persons doing business within this State who are therein designated.

I am therefore of the opinion that it is your duty under the act of 1881 to assess the tax therein provided upon the corporation represented by Mr. Marsh, as proposed in your circular, and may require a report.

I am very respectfully yours,

LESLIE W. RUSSELL,
Attorney General.

PLAINTIFFS' EXHIBIT No. 1. Dec. 20th, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *March 9th*, 1883.

Corporation tax department.

To the proper officer of the company:

SIR: Your company is in default in the payment of the tax due January 15th, 1883, on its franchise or business, based on your report filed in this office, as provided by sections 1 and 3 of chapter 361, Laws of 1881.

144 An account was mailed to your company from this office about January 10th, showing the amount due as ascertained from the report above referred to.

Heretofore, in view of the fact that the statement was of recent enactment and in some cases, perhaps, not well understood, I have refrained from commencing legal proceedings; but this reason no

longer exists and I must call your attention to the fact that the law requires me te enforce collections if payment is further delayed.

Respectfully yours, IRA DAVENPORT,
Comptroller.

PLAINTIFFS' EXHIBIT No. 2. Dec. 20th, 1883.

STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *March 9th*, 1882.

Corporation tax department.

To the proper officer of the company.

SIR: Your company is in default in the payment of the tax due January 15th, 1882, on its franchise or business, based on your report filed in this office, as provided by sections 1 and 3 of chapter 361, Laws of 1881.

An account was mailed to your company from this office about January 10th, showing the amount due, as ascertained from the report above referred to.

In view of the fact that the statute is of recent enactment and in some cases, perhaps, not well understood, I have concluded, before commencing legal proceedings, to again call your attention to this matter. If the account remains unsettled by the 20th instant it will be placed in the hands of the attorney general for collection.

Respectfully yours, IRA DAVENPORT,
Comptroller.

145 & 146 Supreme Court, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

CITY AND COUNTY OF NEW YORK, *ss*:

Edward J. Harding, being duly sworn, deposes and says that he is employed in the office of Messrs. Davies, Cole & Rapallo, the attorneys for the defendant herein, and is familiar with the history of the above-entitled action; that the referee, Isaac Lawson, Esq., to whom the case was referred to hear and determine, has never delivered any opinion herein.

EDW. J. HARDING.

Sworn to before me this 28th day of August, 1885.

DONALD B. TOUCEY,
Notary Public, New York County, N. Y.

147 *Opinion at General Term.*

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE HORN SILVER MINING COMPANY.

LANDON, *J.*:

The referee found the fact to be that the defendant was a corporation organized under the laws of the Territory of Utah, and was carrying on business in this State.

He also found that it was not a manufacturing corporation carrying on manufactures within this State.

These facts brought the defendant within the terms of chap. 542, Laws of 1880, 43, as amended by chap. 271, Laws of 1881, 41, which provide that such a company "shall be subject to pay a tax as a tax upon its corporate franchise or business into the treasury of the State annually."

The defendant urges that the referee erred in so finding the facts upon the evidence. Without repeating the evidence here at length, the fact seems to be undisputed that the defendant did do some part of its business here, and that a very important part. The statute says "doing business in this State," not all its business. The referee could not have found otherwise in this respect.

The evidence also showed that the defendant was not "a manufacturing company carrying on manufacture within this State." It may be that its operations in Utah and Illinois, where it separated the silver from the other metals and from the crudities with which it is found to be mingled as it is taken from the mines,
148 may be conventionally and perhaps properly termed a manufacture, but no such separation and no mechanical or other work was done upon it in this State by the defendant.

It was brought here in bars containing about 990 parts of pure silver out of 1,000, and was delivered to the U. S. assay office, where it was refined to the standard of 999 parts in 1,000; but this refined silver was not returned to the defendant. The assay office delivered to the defendant its certificates for the silver deposited, and these certificates the defendants sold in the market. If the refining done by the assay office could be called a manufacture, it was a manufacture carried on by that office and not by the defendant. This proposition seems to us too plain to need further elucidation.

In People *v.* Equitable Trust Co., 96 N. Y., 387, which was the case of a Connecticut corporation, having an office in the city of New York, doing the bulk of its business outside of this State, and but very little in it, the tax imposed under the statute in question was upheld. The court held that the State could impose a tax upon its business done within this State; that that tax could be specific or arbitrary, and not measured by the amount of business done, or dividends earned, or capital employed here. The hardship of this rule of taxation was adverted to in the decision, and its rigor has

since been modified by ch. 501, Laws of 1885, but this legislation has no effect upon the present case.

In the Equitable case, however, it was not denied that the foreign corporation did business in this State, within the meaning of the statute, and hence the court said it was relieved from the necessity of inquiring what it meant by the language "doing business" and "corporate business" in this act. "Does it mean," the court
149 asks but does not answer, "occasional or incidental corporate business, or continuous business through the year?" Other questions are propounded in like manner, from which the learned counsel for the appellant argues that the intimation is plain that if the question had been in the case the court would have decided that the business of the Equitable Company done in this State was too "occasional or incidental" or insignificant to be fairly considered as falling within the purview of the statute, and he asks that the supposed intimation in that case be made the rule of decision in this.

We do not think, however, that the business of the defendant done in this State can be said to be merely occasional or incidental. It had its corporate office in the city of New York, in which its board of directors held their meetings and its officers issued directions to the agents of the company in Utah and Illinois and where the registry of stock was kept. Besides this, all its silver product was sent to New York to be refined at the assay office and to be disposed of by the sale of the certificates issued by that office. Its dividends were declared and made payable there and its funds to large amounts invested there.

We are cited to the case of People *ex rel.* Bank of Montreal *v.* Com'rs of Taxes, 59 N. Y., 40, as an authority to the effect that money sent by a non-resident to this State for investment is not taxable against him under chap. 37, Laws of 1885, which subjects non-residents doing business in this State to taxation upon the moneys employed in such business. But the exemption in that case was allowed under chap. 176, Laws of 1851, which exempted foreign capital transmitted to agents here for the purpose of investment or otherwise from taxation. The court drew the distinction between the principal who lived out of the State and himself transacted his business in it without the intervention of a resident agent and the principal whose real residence and business where in another
150 State but who sent money here to be loaned by his resident agent.

In the former case the fact of non-residence, if the principal in fact and in person did business here, did not exempt his capital employed in the business from taxation under the law of 1885, while in the latter case if the non-resident simply sent money here to a resident agent to be loaned in the name of the principal and no other business was transacted the exemption of the act of 1851 applied, the court holding that such a transaction was not the doing business which gave the State jurisdiction to tax the money lent.

The defendant, however, is not a mere non-resident money-lender acting through the person of a resident agent. So far as it is possible for a foreign corporation to be personally present, it is in person

doing business here, and that business embraces the further business necessary to be done to make its base bullion marketable as standard bullion and to market the same, and thus to realize in this State the money it loans here. Nor does it simply send its product here for sale and remit all the proceeds to the State of its incorporation or legal residence, as in the case of Parker Mills *vs.* The Com'rs of Taxes, 23 N. Y., 242.

We do not think the court of appeals has yet announced a rule that will exempt the defendant from the taxes imposed.

The tax imposed upon the defendant was $7,500 for the year 1881 and $30,000 for the year 1882. It was imposed upon the basis of the reports made to the comptroller. The statute provides that "if the officers of any such corporation shall neglect to pay the tax imposed on such corporation within fifteen days after the first of January it shall be the duty of the comptroller to add ten per centum to the tax of said corporation for each and every year for which said tax shall not have been paid, which percentage
151 shall be assessed and collected with the said tax in the usual manner of collecting and assessing such taxes."

The tax not having been paid within the prescribed time, or at all, the comptroller did add ten per centum thereto, and such addition is embraced in the judgment from which this appeal is taken.

Evidence was given upon the trial which seems to exhibit this additional tax or penalty as a harsh addition to the original tax, but the comptroller had the power, and perhaps was bound to impose it. The defendant did neglect to pay it; that neglect was no doubt induced by the hope that the rule of construction adopted by the comptroller would be modified by the courts, and that the statute as to foreign corporations would be declared unconstitutional.

Time was really what the defendant wanted, in the hope that time would show its right to exemption in whole or in part. The comptroller extended time, but the comptroller could not repeal or suspend the law.

The extra allowance granted was under the circumstances quite moderate.

Judgment and order affirmed with costs.

Learned, P. J., concurs.

A true copy.

MARCUS T. HUN,
Supreme Court Reporter.

152 *Order of Affirmance.*

At a general term of the supreme court of the State of New York, held at the city hall, in the city of Albany, in and for the third judicial department, on the 17th day of November, 1885.

Present: Hon. William L. Learned, presiding justice; Hon. Judson S. Landon, Hon. Augustus Bockes, associate justices.

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
vs.
THE HORN SILVER MINING COMPANY, Appellant.

An appeal from the judgment and order herein coming on to be heard at a term of this court held at the city hall, in the city of Albany, on the 17th day of November, 1885, and after hearing Julien T. Davies, Esq., of counsel for the defendant, appellant, in support of said appeal, and Hon. D. O'Brien, attorney general, in opposition thereto, and due deliberation being had thereon—

Ordered that said judgment appealed from be, and the same hereby is, in all things affirmed, with ten dollars costs and printing disbursements, said costs to be paid by the appellant to the respondents.

153 *Judgment.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
vs.
THE HORN SILVER MINING COMPANY, Appellant.
} Judgment.

The appeal in the above-entitled action from the judgment entered therein in favor of the plaintiffs and against the defendant, in the office of the clerk of the county of Albany, on the 3rd day of June, 1885, and from the order granting extra allowance having been brought on for argument at a general term of this court, and said judgment appealed from having been affirmed in all things, with costs, and said order appealed from having been affirmed in all things, with ten dollars costs and printing disbursements:

Now, on motion of D. O'Brien, attorney general and attorney for plaintiffs, respondents—

It is ordered, adjudged, and decreed that said judgment and order appealed from be, and the same hereby is, affirmed.

And it is further ordered, adjudged, and decreed that the defendant, appellant, pay to the plaintiffs, respondents, the sum of sixty dollars and no cents, the costs of said appeal, and the further sum of ten dollars ($10) costs and forty $\frac{95}{100}$ dollars disbursements on appeal from said order, making in all the sum of one hundred and ten dollars and ninety-five cents, and that the plaintiffs, respondents, have execution therefor.

WM. D. STREVELL, *Clerk.*

154 *Notice of Appeal.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE HORN SILVER MINING CO., Defendant.
} Notice of Appeal.

You will please take notice that the above-named defendant, The Horn Silver Mining Company, hereby appeals to the court of appeals from the judgment of the general term of this court in this action, entered in the office of the clerk of the said court on the eighth day of December, 1885, affirming the judgment entered herein for the sum of $42,159.75 on the third day of June, 1885, upon a decision in favor of the plaintiffs and against the defendant, and affirming an order entered herein on the third day of June, 1885, granting an extra allowance to the plaintiffs herein, and from each and every part of the said judgment.

Dated New York, 1st February, 1886.

Yours, etc., DAVIES, COLE & RAPALLO,
Attorneys for Defendant and Appellant.

To Hon. Denis O'Brien, attorney general, and William D. Strevell, Esq., clerk of said court.

155 At a special term of the supreme court of the State of New York held at the city hall, in the city of Albany, on the 28th day of March, 1887.

Present: The Hon. Alton B. Parker, justice, presiding.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

On reading and filing the remittitur from the court of appeals to the supreme court herein, directing that the appeal from the judgment and order of the general term herein, heretofore entered, be affirmed and the plaintiffs, respondents, recover the costs of the appeal to the court of appeals of the defendants, appellant:

Now, on motion of Mr. D. O'Brien, attorney general and attorney for plaintiffs—

Ordered that said decision be, and the same hereby is, made the judgment of the supreme court, and that judgment be entered herein affirming said judgment and order appealed from, with costs in the court of appeals.

Enter in Albany county.

A. B. PARKER,
Justice of the Supreme Court.

156 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

An appeal having heretofore been taken to the court of appeals from the judgment and order of the general term of the supreme court herein, entered December 8th, 1885, in favor of the plaintiffs and against the defendant, and said appeal having been duly considered by the court and a decision having been rendered whereby said judgment and order appealed from is affirmed, with costs in that court, to be recovered by the respondents of the appellant, as appears by their remittitur to this court, which is this day filed:

Now, on reading and filing said remittitur and the order of the special term of the supreme court held by the Hon. Alton B. Parker, justice of this court, dated March 28th, 1887, making the decision of the court of appeals the judgment of this court, and the bill of costs of the plaintiffs, respondents, as taxed this day, and, on motion of Mr. D. O'Brien, attorney general and attorney for plaintiffs, respondents—

Ordered that said judgment and order appealed from be, and the same hereby is, affirmed, and that said plaintiffs, respondents, recover of the defendants, appellants, the sum of one hundred thirty-four dollars and thirty-two cents, and have execution therefor.

157 [Endorsed:] Supreme court. The People of the State of New York *vs.* The Horn Silver Mining Company. Copy. Order and judgment. D. O'Brien, attorney general, Capitol, Albany, N. Y. Please take notice that the within is a copy of an order and judgment this day entered in the office of the clerk of Albany county. Yours, &c., D. O'Brien, att'y gen. and pl'ffs' att'y, Capitol, Albany, N. Y. March 28th, 1887.

[Stamped:] Copy this day received, Mar. 30, 1887. Davies, Cole & Rapallo.

158 Supreme Court of the United States.

THE HORN SILVER MINING COMPANY, Plaintiff in Error,
against
THE PEOPLE OF THE STATE OF NEW YORK, Defendant- in Error.

Know all men by these presents that I, Frank G. Brown, of the city and county of New York, in the State of New York, am held and firmly bound unto The People of the State of New York, the above-named defendants in error, in the sum of fifty thousand dollars, lawful money of the United States of America, to be paid to the said The People of the State of New York; for the payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents.

Sealed with my seal and dated this thirty-first day of March, A. D. 1887.

Whereas the above-named The Horn Silver Mining Com-
159 pany has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the supreme court of the State of New York, upon remittitur from the court of appeals of the State of New York, in an action wherein the above-named The People of the State of New York are plaintiffs and the above-named The Horn Silver Mining Company is defendant:

Now, therefore, the condition of this obligation is such that if the said The Horn Silver Mining Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

FRANK G. BROWN. [L. S.]

Signed, sealed, and delivered in the presence of—
SAMUEL B. BENN.

160 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Frank G. Brown, the obliger above named, being duly sworn, deposes and says that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

FRANK G. BROWN.

Sworn to before me this 31st day of March, 1887.

SAM'L B. BENN,
Notary Public, N. Y. Co.

United States of America, Southern District of New York.

STATE OF NEW YORK, } ss:
City and County of New York, }

On this thirty-first day of March, A. D. 1887, before me personally came Frank G. Brown, to me personally known and known to me to be the individual described in and who executed the
161 foregoing bond or obligation, and he thereupon acknowledged to me that he executed the same for the purposes therein mentioned.

SAM'L B. BENN,
Notary Public, N. Y. Co.

STATE OF NEW YORK, } ss:
City and County of New York, }

I, James A. Flack, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Sam'l B. Benn, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgment a notary public

in and for the city and county of New York, dwelling in the said city, and commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the hand-
162 writing of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of the said court and county the 31st day of March, 1887.

JAMES A. FLACK, *Clerk.*

I approve the above bond as to form and sufficiency.
April 1st, 1887.

WM. C. RUGER,
Chief Justice of the Court of Appeals of the State of New York.

163 [Endorsed:] Supreme court of the United States. The Horn Silver Mining Company, plaintiff in error, against The People of the State of New York, defendants in error. Bond under $1,000, Rev. Statutes U. S. Davies, Cole & Rappallo, attorneys for plaintiff in error, 32 Nassau street, New York city. Filed Ap'l 2, '87.

164 UNITED STATES OF AMERICA, *ss:*

To the people of the State of New York, Hon. Denis O'Brien, attorney general, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1887, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York in and for the county of Albany, wherein The Horn Silver Mining Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be *due* to the parties in that behalf.

Dated at the city of Albany this 1st day of April, 1887.

WM. C. RUGER,
Chief Justice of the Court of Appeals of the State of New York.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 1st day of April, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

[L. S.] H. S. DOOLITTLE,
Clerk of the Circuit Court of the United States of America for the Northern District of New York, in the Second Circuit.

165 (Endorsed:) United States Supreme Court. The Horn Silver Mining Company, plaintiff in error, against The People of the State of New York, defendants in error. (Copy.) Citation. Davies, Cole & Rapallo, attorneys for pl't'ff in error, Mutual Life

building, 32 Nassau street, New York city. Allowed April 1st, 1887. —— ——, chief justice of the court of appeals of the State of New York.

166 To the Honorable William C. Ruger, chief justice of the court of appeals of the State of New York:

And now comes the Horn Silver Mining Company, by Davies, Cole & Rapallo, its attorneys, and complains that in the record and proceedings and also in the rendition of a judgment of a plea in the suit between The People of the State of New York, plaintiffs, and The Horn Silver Mining Company, defendant, which is in the supreme court of the State of New York on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision in said suit could be had, remitting to the said supreme court of the State of New York the record in the said suit, with an order affirming the said judgment theretofore rendered in the said supreme court on the third day of June, 1885, in favor of the plaintiffs and against the defendant for the sum of forty-two thousand one hundred and fifty-nine $\frac{75}{100}$ dollars ($42,159.75), and directing that the same be enforced; upon which direction a final judgment of affirmance was entered in said supreme court of the State of New York on the 28th day of March, 1887, with costs in the sum of one hundred and thirty-four dollars and thirty-two cents ($134,32), where was drawn in question the validity of a statute of said State and of an authority exercised thereunder, on the ground of their being repugnant to the
167 Constitution and laws of the United States, and the decision was in favor of such their validity, and where titles, rights, privileges, and immunities were claimed under the Constitution of the United States and the decision was against the title, rights, privileges, and immunities specially set up and claimed by the said Horn Silver Mining Company under such Constitution & laws, all of which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of the said Horn Silver Mining Company:

Wherefore the said Horn Silver Mining Company, by its attorneys aforesaid, prays for the allowance of a writ of error and such other process as may cause the said error to be corrected by the Supreme Court of the United States and the said final judgment to be re-examined and reversed.

DAVIES, COLE & RAPALLO,
Attorneys for Horn Silver Mining Company,
32 Nassau Street, New York.

168 [Endorsed:] United States Supreme Court. The Horn Silver Mining Company, plaintiff in error, against The People of the State of New York, defendants in error. (Copy.) Petition for writ of error. Davies, Cole & Rapallo, attorneys for pl'ff in error, Mutual Life building, 32 Nassau street, New York city. Filed Ap'l 2, '87. Allowed April 1st, 1887. Wm. C. Ruger, chief justice of the court of appeals of the State of New York. Due and timely service

of a copy of a petition of which the within is a copy hereby admitted this 2nd day of April, 1887. D. O'Brien, att'y general of the State of New York, def'ts in error. Due and timely service of a copy of the bond filed herein hereby admitted this 23rd day of April, 1887. D. O'Brien, att'y gen'l of the State of New York, for def'ts in error.

169 In the Supreme Court of the United States. In Error.

THE HORN SILVER MINING COMPANY, Plaintiff in Error,
against
THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.
} October Term, 1887.

Of October term, in the year of our Lord one thousand eight hundred and eighty-seven.

Afterwards, to wit, on the first Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Horn Silver Mining Company, by Davies, Cole & Rapallo, its attorneys, and says that — the record and proceedings aforesaid, and also in said judgment, there is manifest error, in this, to wit, that in the record aforesaid it appears that the judgment aforesaid was given for the said defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendants in error; and also, in this, to wit, that the said plaintiff in error claimed that it was entitled in the court of appeals of the State of New York to a reversal of the judgment of the supreme court of the State of New York, which affirmed on appeal the judgment of the trial court in favor of the defendants in error herein and against the plaintiff in error herein on the grounds—

170 (1.) The court below erred in deciding that L. 1880, ch. 542, of the State of New York as amended by Laws 1881, ch. 361, and the authority attempted to be exercised within the State of New York and dependent upon the said statute were not repugnant to the Constitution of the United States and were valid, the validity of said statute and said authority having been drawn in question in said suit on the ground of their being repugnant to the Constitution of the United States in that the taxation of plaintiff in error under the said statute would be a deprivation by said State of the property of the plaintiff in error without due process of law, and the court below erred in deciding that said statute and the taxation attempted thereunder by said State did not deprive the plaintiff in error of its property without due process of law.

(2.) The court below erred in deciding that L. 1880, ch. 542, of the State of New York as amended by Laws 1881, ch. 361, and the authority attempted to be exercised within the State of New York and dependent upon the said statute were not repugnant to the Constitution of the United States and were valid, the validity of said statute and said authority having been drawn in question in

said suit on the ground of their being repugnant to the Constitution of the United States in that the taxation of plaintiff in
171 error under the said statute would take the private property of plaintiff in error for public use without just compensation, and the court below erred in deciding that said statute and the taxation attempted thereunder did not take the private property of plaintiff in error for public use without just compensation.

(3.) The court below erred in deciding that L. 1880, ch. 542, of the State of New York as amended by Laws 1881, — 361, and the authority attempted to be exercised within the State of New York and dependent upon the said statute were not repugnant to the Constitution of the United States and were valid, the validity of said statute and said authority having been drawn in question in said suit on the ground of their being repugnant to the Constitution of the United States in that the taxation of plaintiff in error under the said statute would be a denial to the plaintiff in error by the State of New York of the equal protection of its laws, and the court below erred in deciding that said statute and the taxation attempted thereunder was not a denial by the State of New York of the equal protection of its laws.

(4.) The court below erred in deciding that L. 1880, ch. 542, of the State of New York as amended by Laws 1881, ch. 361, and the authority attempted to be exercised within the State of New York and dependent upon the said statute were not repugnant to the Constitution of the United States and were valid, the validity of
172 said statute and said authority having been drawn in question in said suit on the ground of their being repugnant to the Constitution of the United States in that the taxation of plaintiff in error under the said statute would be a regulation of commerce among the several States, and the court below erred in deciding that said statute and the taxation attempted thereunder was not a regulation of commerce among the several States.

(5.) The court below erred in deciding that L. 1880, ch. 542, of the State of New York as amended by Laws 1881, ch. 361, and the authority attempted to be exercised within the State of New York and dependent upon the said statute were not repugnant to the Constitution of the United States and were valid, the validity of said statute and said authority having been drawn in question in said suit on the ground of their being repugnant to the Constitution of the United States in that the taxation of plaintiff in error under the said statute would interfere with the sovereignty of the State of Utah, and the court below erred in deciding that said statute and the taxation attempted thereunder did not interfere with the sovereignty of the State of Utah.

(6.) The court below erred in deciding that L. 1880, ch. 542, of the State of New York as amended by Laws 1881, ch. 361, and the authority attempted to be exercised within the State of New York and dependent upon the said statute were — repugnant to the
173 Constitution of the United States and were valid, the validity of said statute and said authority having been drawn in question in said suit on the ground of their being repugnant to the Con-

stitution of the United States in that the taxation of the plaintiff in error under the said statute would tax property and business without the jurisdiction of the State of New York, and the court below erred in deciding that the said statute and the taxation attempted thereunder did not tax property and business without the jurisdiction of the State of New York.

(7.) The court erred in deciding against the titles, rights, privileges, and immunities specially set up and claimed by the plaintiff in error under the Constitution of the United States, namely, that it was not subject to the assessment and taxation provided for by said statute, and no tax could be legally imposed upon the plaintiff in error thereby or be collected from it thereunder.

(8.) The court erred in deciding that Laws of 1880, ch. 542, of the laws of the State of New York as amended by Laws of 1881, ch. 361, and the authority attempted to be exercised in the State of New York and dependent upon said statute were not repugnant to the Constitution of the United States and were valid, the validity of said statute and said authority having been drawn in question
174 in said suit on the ground of their being repugnant to the Constitution of the United States, because of the facts set forth in the answer to the complaint herein and because it establishes an unjust and unequal system of taxation, in that it attempts to fix the amount of tax to be paid by the plaintiff in error wholly without regard to the extent of corporate franchises exercised by it within the State of New York, and without regard to the amount of business done by it within the State of New York or the amount of capital employed within the State of New York or the amount of property owned by it and situated in the State of New York, and without regard to the amount of its capital stock held in the State of New York, and without regard to the extent of the protection and benefits derived from the laws or agencies of the State of New York, and because it seeks in effect to tax property and persons not within the jurisdiction of the State of New York or in any way subject to its authority, and violates principles of equality and uniformity.

(9.) The plaintiff in error assigns the same errors of the court below in respect to Laws 1880, chapter 542, of the State of New York as amended by Laws 1881, chapter 361, and Laws 1882, chapter 15[1], as it has assigned both in respect to Laws 1880, chapter 542, of the State of New York as amended by Laws 1881, chapter 361.

10. The court below erred in finding and deciding in re-
175 spect to the first alleged cause of action as is set out in findings I, V, and VI in the report or decision of the referee herein, except so much of said finding I as finds that the plaintiff in error is and was at all the times thereinafter mentioned and referred to a corporation duly incorporated and organized under the laws of the Territory of Utah.

(11.) The court below erred in finding and deciding with respect to the first cause of action herein as is set out in conclusions of law I, II, and III in the report or decision of the referee herein, except so much of said conclusion of law III as is embraced in the words "and eight" therein and in the words "nor the matters alleged in

the paragraph numbered four of the fifth defense to said first cause of action set forth in the answer herein " therein.

(12.) The court below erred in finding and deciding in respect to the second cause of action herein as set out in findings I, IV, and V of the findings of fact in the report or decision of the referee herein, except so much of the said finding I as finds that the plaintiff in error is and was at all the times thereinafter mentioned and referred to a corporation duly incorporated and organized under the laws of the Territory of Utah; and the court erred in finding and deciding as set out in the whole or so much of the said referee's IX finding of fact and each and every part thereof as implies that any tax became payable from this plaintiff in error.

176 (13.) The court below erred in finding and deciding in respect to the second alleged cause of action herein as is set out in conclusion of law I, II, III, IV, and V in the report or decision of the referee herein, except so much of said conclusion of law III as is embraced in the words "and eight" therein and in the words " nor the matters alleged in the paragraph numbered four of the fifth defense to said first cause of action set forth in the answer herein " therein.

(14.) The court below erred in refusing to find and decide as propositions of fact in respect to the first alleged cause of action herein.

In accordance with plaintiff in error's request 16 and 24 herein.

(15.) The court below erred in refusing to find and decide as conclusions of law with respect to the first alleged cause of action herein as follows:

(*a.*) In accordance with so much of plaintiff in error's requests 1 and 2 herein as requested that the plaintiff in error was not during the year ending November 1st, 1881, liable to be taxed under the statute named.

(*b*) In accordance with so much of plaintiff in error's request to find herein as requested that the said statute never became law and is void, and that no tax was legally imposed upon the plaintiff in error thereby or could be collected from it thereunder.

177 (*c.*) In accordance with plaintiff in error's requests VII, X, XIII, XIV, and XVII herein.

(16.) The court below erred in refusing to find as propositions of fact with respect to the second alleged cause of action herein as follows:

In accordance with plaintiff in error's requests XIV and XXI herein.

(17.) The court below erred in refusing to find and decide as conclusions of law with respect to the second alleged cause of action herein as follows:

(*a.*) In accordance with so much of plaintiff in error's requests one and two herein as requested that the plaintiff in error was not, during the year ending November 1st, 1882, liable to be taxed under the statute named.

(*b.*) In accordance with plaintiff in error's requests third and fourth.

(*c.*) In accordance with so much of plaintiff in error's request fifth as requested that chapter 542, Laws of 1880, as amended by Laws 1881, chapter 361, and Laws 1882, chapter 151, never became law and was void, and that no tax was legally imposed upon plaintiff in error thereby and could not be collected from it thereunder.

(*d.*) In accordance with plaintiff in error's requests sixth, seventh, tenth, thirteenth, fourteenth, and sixteenth herein.

178 And that the said court of appeals should have so held and decided and should have reversed the judgment of the supreme court of the State of New York on said grounds; but the said court of appeals, in fact, decided the contrary thereof and affirmed the said judgment of the supreme court of the State of New York; whereupon, upon the 28th day of March, 1887, the said decision of the court of appeals was made the judgment of the supreme court of the State of New York and judgment of affirmance of the judgment of the supreme court affirming the judgment of the trial court was entered thereupon, and the said The Horn Silver Mining Company prays that the decision of the court of appeals aforesaid and the said judgment of the supreme court of the State of New York aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by occasion of the said judgment.

DAVIES, COLE & RAPALLO,
Attorneys for Plaintiff in Error,
32 *Nassau Street, N. Y. City.*

179 [Endorsed:] N. Y. supreme court. The People of the State of New York against The Horn Silver Mining Company. (Copy.) Assignments of error. Davies, Cole & Rapallo, attorneys for pl'ff in error, Mutual Life building, 32 Nassau street, New York city.

180 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of New York, in the third judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to you or some of you the final decree or judgment of said court to be enforced in the suit between The People of the State of New York, plaintiffs, and The Horn Silver Mining Company, defendant, wherein was drawn in question the validity of a statute of said State and of an authority exercised thereunder on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of such their validity, a manifest error hath happened, to the great damage

of the said Horn Silver Mining Company, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all
181 things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of April, in the year of our Lord one thousand eight hundred and eighty-seven, & of the Independence of the United States the one hundred & eleventh.

[L. S.] H. S. DOOLITTLE,
Clerk of the Circuit Court of the United States of America for the Northern District of New York, in the Second Circuit.

182 [Endorsed:] Supreme Court of the United States. The Horn Silver Mining Company, plaintiff in error, against The People of the State of New York. (Copy.) Writ of error. Davies, Cole & Rapallo, attorneys for pl'ff in error, Mutual Life building, 32 Nassau street, New York city. Filed Ap'l 2, '87. Allowed by Wm. C. Ruger, chief justice of the court of appeals of the State of New York. Due and timely service of a copy of a writ of error of which the within is a copy hereby admitted the — day of April, 1887. D. O'Brien, attorney gen'l of the State of New York, for def'ts in error.

183 THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
v.
THE HORN SILVER MINING COMPANY, Appellant.

EARL, *J.*:

This action was commenced to recover certain taxes claimed to be due from the defendant under chapter 542 of the Laws of 1880 as amended by chapter 361 of the Laws of 1881 and chapter 151 of the Laws of 1882. The plaintiffs claim in their complaint that there was due Jan'y 1st, 1882, from the defendant the sum of $7,500, being the tax at the rate of one and one-half mills on each dollar of valuation of its capital stock at $5,000,000, and also $1,500 as a penalty for neglect or refusal to pay the tax for two years. They also claim that there was due Jan'y 1st, 1883, from the defendants the
184 sum of $30,000, being a tax at the rate of one-quarter of a mill for each one per centum of dividends declared during the year ending November 1st, 1882, upon $10,000,000, the par value of defendant's capital stock, the dividends declared being

twelve per centum, and also $3,000 as a penalty for neglect or refusal to pay the tax within fifteen days from Jan'y 1st, 1883.

The defendant is a foreign corporation incorporated under the laws of the Territory of Utah. The plaintiffs recovered the amount of taxes and penalties claimed and the defendant complains of the recovery upon several grounds, which will be separately considered.

The constitutional objections to the acts under which these taxes were imposed have been sufficiently considered in prior decisions of this court, and the acts must now be regarded as free from constitutional objection, and therefore valid. (People *v.* Home Ins. Co., 92 N. Y., 328; People *v.* Equitable Trust Co., 96 N. Y., 387; People *v.* Gold and Stock Telegraph Co., 98 N. Y., 67.) We have now, therefore, only to construe the acts and apply them to the facts of this case.

185 First. The defendant claims that it was "a manufacturing corporation carrying on manufacture within this State," and therefore not liable to taxation under sec. 3 of the act of 1881, which excepts such corporations from taxation under that act. As appears from its articles of association, the defendant was organized to conduct the business of mining in Utah Territory; of the buying selling, leasing, and operating mines and mining claims in that Territory, and smelting, reducing, and refining works there or elsewhere; if conducting a general mining, milling, and smelting business in all its branches, including buying and selling mineral ores and bullion, carrying on a general mercantile business by buying and selling such goods, merchandise, stores, and miners' supplies as are usually kept in and required by the wants of a mining camp or settlement; of the building and operating all such roads, tramways, and transportation routes as may be convenient in transporting the produce of its business or procuring supplies; of purchasing,

186 hiring, and holding all such real and personal property, wherever situate, as may be required in carrying on any of its business, and, when no longer required for business purposes, leasing, selling or exchanging the same, and generally to do all acts and things incidental to a general mining business or to any of the specified pursuits, the corporation being primarily formed for the immediate purpose of working and developing the estate, property, and premises known as the Horn Silver mine, and for the treatment and reduction of the ores and metals therein contained. The business of the defendant in Utah consisted in mining the ore and manufacturing it into bare bullion. The bullion was then shipped to Chicago, where it had a refining in which the lead was smelted from the bare bullion and separated from the silver. The bullion thus refined was then shipped to the city of New York, where it was delivered to the United States assay office, where it was still further refined into standard silver bars, for doing which the defendant paid two

187 per cent. of the silver. It generally sold the receipts issued for the silver by the assay office in the city of New York, and so much of the proceeds as were not used there were transmitted to Utah and Chicago for use in the business of the company at those points. It did not have or carry on within this State any refining

or manufacturing establishment and its claim to be a manufacturing corporation carrying on manufacture within this State is based solely upon the fact that it delivered its bullion to the assay office to be further refined for a compensation to be paid by it. Upon these facts the referee found that it was not engaged in manufacture within this State and we are of the same opinion. As its name implies, it is a mining corporation and was organized primarily for that purpose, and all its other business was incidental, connected with, and related to that; but even if it could in any proper sense, according to the common understanding of the phrase used in this statute, be deemed a manufacturing corporation in Utah, yet
188 it cannot with any propriety be said that it carried on manufacture within this State. According to common comprehension and the ordinary use of language the process of refining this bullion at the assay office was not a manufacture and the assay office was not a manufacturing establishment; but whether it was or not, the defendant, which employed the assay office for a compensation to refine the bullion, was not itself engaged in the manufacture. It was no more a manufacturer than a farmer is who takes his grain to the grist mill to be ground into flour for a part of the grain or a money compensation, or who takes his wool to a cloth manufacturer to be made into cloth for a compensation and then to be returned to him. A railroad company may manufacture all its cars and engines and yet it cannot be properly classified as a manufacturing company.

The definition of the terms "manufacturing corporations" and "manufacture," as derived from some decisions and statutes to which our attention has been called, is of little service in the con-
189 struction of the language of this act. These terms must be construed in view of the general purposes of the acts in which they are used and the general phraseology found in connection with them. To give effect to the legislative intention their ordinary meaning may be enlarged or restricted. Under this section it is not sufficient to exempt a corporation from taxation that it is a manufacturing corporation, but it must also carry on manufacture within this State. In exempting such corporations from taxation under the act, the Legislature may be supposed to have been influenced by two things—a desire to encourage manufacture within the State and the fact that a corporation carrying on any manufacturing business within the State would necessarily have visible, tangible property, liable under the general laws of the State to taxation. We are therefore constrained to hold that the defendant cannot be allowed the exemption claimed.

Second. It is claimed that the defendant was not, during the years 1881 and 1882, "doing business in this State," and that there-
190 fore it was not liable to taxation under the act of 1881. It is quite true that by far the larger share of its business was carried on in Utah and at Chicago, but its president, secretary, and treasurer had their offices in New York; the directors held their annual meetings there; its dividends were declared and paid there; its silver bullion was all sent there and sold there and the proceeds

of it received there; some of the proceeds were deposited in banks, some loaned in the city of New York, and some of it used for the purposes of the company in that city, and the balance was transferred to Chicago and Utah for use in the business of the company. There was thus a very substantial portion of its business done in the city of New York. The business did not consist of occasional transactions, but an office was kept there and the business continuously transacted there during the whole year. We cannot construe the words "doing business in this State" to mean the whole business of the corporation within this State; and while we are not pre-
191 pared to hold that an occasional business transaction, that keeping an office where meetings of the directors are held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation is done, would bring a corporation within this act; yet when, as in this case, all these things are done and in addition thereto a substantial part of the regular business of the corporation is carried on here, then we are unable to say that the corporation is not brought within the act as one "doing business in this State." There is no injustice in subjecting to taxation such a corporation enjoying the benefits of our great mart, the advantages of our social order, and the protection of our laws.

Third. It is further claimed that in computing the taxes only *only* the amount of defendant's capital employed within this State should have been taken as the basis, and not its entire capital. We do not perceive how it is possible to limit the computation of the taxes as thus claimed. Section 1 of the act of 1881 provides that hereafter it shall be the duty of the president and treasurer of
192 every corporation liable to be taxed on its corporate franchises or business to make report to the comptroller annually in writing, stating specifically the amount of "capital" paid in; that in all cases where any such corporation shall fail to make or declare any dividend upon either its "common or preferred stock," or in case the dividend or dividends made or declared upon either its "common or preferred stock" during the year shall amount to less than six per centum upon the par value of the "stock," the treasurer and secretary thereof shall in each year in which no dividend has been made or declared, or in which the dividend made or declared upon either its "common or preferred stock" amounted to less than six per centum upon the par value of the "stock," estimate and appraise the "capital stock" of the company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash, and shall forward a certificate thereof to the comptroller.
193 Section 3 provides that every corporation incorporated under any law of this State or under the laws of any other State or country and doing business in this State, except savings institutions and other corporations named, shall be subject to and pay a tax upon its corporate franchise or business, to be computed as follows: If the dividend or dividends made or declared by such corporation,

joint-stock company, or association during any year amount to six or more than six per centum upon the par value of "its capital stock," then the tax to be at the rate of one-quarter mill upon the "capital stock" for each one per centum of dividends so made or declared; or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of "the capital stock," then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the "capital stock" made in accordance with the provisions of the first section of the act; and in case any such corporation, joint-stock company, or association shall have more than one kind of "capital stock," as,
194 for instance, "common and preferred stock," and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividends made or declared amounted to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared "upon the capital stock," upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of the act, of "the capital stock" upon which no dividend was made or declared or upon the par value of which the dividend or dividends made or declared did not amount to six per centum. It is very clear from this review of the two sections that the whole
195 capital stock, the same stock upon which dividends are declared and paid, is to be taken as the basis of taxation; and so we held in People *v.* Equitable Trust Co. (96 N. Y., 387), where we said that "we find no authority in this act for apportioning a tax upon such a corporation as this upon the amount of dividends earned in this State or upon the amount of capital stock employed in this State"

But it is claimed that since the act of 1882 a different construction should be given to the act of 1881. The act of 1882 did not amend any of the sections of the act of 1881, but added thereto three sections, the first of which—section 11—it is important only to notice. That provides that when the comptroller is dissatisfied with the report of any corporation or association or joint-stock company liable to pay a tax under any of the provisions of the act, whose capital is only partially employed in this State, he is authorized to fix and determine the amount of capital stock which, in his judgment, shall be the basis for the tax under the provisions of the act, and to settle on account for the taxes, penalties, and in-
196 terest due the State thereon; and any association, corporation, or joint-stock company dissatisfied with the account so settled may, within ten days after notice thereof, appeal therefrom to a board consisting of the secretary of state, attorney general, and State treasurer, which board on such appeal shall affirm or correct the account so settled by the comptroller, and the decision of such

board shall be final. Under the act of 1881 it was the duty of every corporation liable to taxation under that act annually to make a report to the comptroller stating specifically the amount of its entire capital paid in and the amount and rate of per cent. of each dividend declared during the year; and in case it had declared no dividend during the year or a dividend of less than six per centum upon the par value of its stock, it was also required to send a verified estimate and appraisal of its capital stock to the comptroller; and it was provided that if the comptroller was not satisfied with the valuation so made and returned he could make a valua-
197 tion thereof and settle an account upon a valuation made by him for the taxes, penalties, and interest due the State thereon; and it was further provided that if the corporation was dissatisfied with the account so settled it could appeal to a board, consisting of the secretary of state, attorney general, and State treasurer, which board on such appeal could affirm or correct the account as settled by the comptroller, and the decision of such board was final. Under that act the whole capital stock was to be reported, and in the cases provided the whole capital stock was to be estimated and appraised and all the clear and express provisions in the act of 1881 are left unrepealed. Now, what was meant by section 11 in the act of 1882? It does not authorize the corporation, in making the report required by the first section of the act of 1881, to report only the amount of its capital employed within this State, and it does not require the comptroller to take the amount of capital so employed as the basis of taxation. The utmost effect that can be given to it is to
198 authorize the comptroller, when he shall ascertain that only a portion of the capital of a corporation is employed within this State, to fix and determine the amount of capital stock which in his judgment shall be the basis of the tax under the provision of the act. That was an authority which he did not have under the act of 1881. Under that act he had no right to review the report of the corporation as to the amount of its capital stock, but under the act of 1882, in all cases where a portion only of the capital stock of the corporation is employed within this State, he has a right to review the report and determine the amount of the capital stock which shall be used as a basis for the tax. There is another qualification to section eleven, and that is before the comptroller can be called upon to exercise his judgment and discretion he must be dissatisfied with the report of the corporation. Here there was no dissatisfaction on the part of the comptroller, and hence the emergency which authorized him to exercise his judgment in fixing and determining the amount of capital stock which is to be taken as
199 the basis for the tax had not arisen. That this is a proper construction of section eleven of the act of 1882 is made more clear by reference to chapter 501 of the Laws of 1885. In that act section eleven is amended so as to provide in distinct terms that the amount of capital stock which shall be the basis for taxation under the provisions of section 3 of the act of 1881, in the case of every corporation, joint-stock company, and association liable to taxation thereunder, "shall be the amount of capital stock employed within

this State." Then for the first time the basis for computing the tax was actually fixed by law at the amount of capital stock employed within this State, and the discretion conferred upon the comptroller by the same section in the act of 1882 was taken away.

Therefore, while it is extremely hard and unjust that the defendant should be required to pay a tax computed upon the basis of its entire capital stock, we are unable so to construe the statute as to relieve it therefrom. The injustice of such a basis of taxation
200 has finally been recognized by the Legislature, and it is quite unfortunate for the defendant that it is deprived of the benefit of this change, particularly as by the 14th section of the act of 1885 the comptroller was authorized and directed upon the application to him of any corporation to make, settle, and adjust all accounts against such corporation, joint-stock company, or association for all taxes and penalties arising under the third section of the act of 1881 since the 12th day of May, 1882, by taking as a basis for taxation the capital employed within the State by such corporation, association, or joint-stock company; but there was a further provision in section 14 that such corporation, joint-stock company, or association should not be entitled to the benefit of a settlement upon such basis unless it shall have secured such adjustment and paid into the treasury the full amount of the taxes so settled before the first day of August, 1885, nor in the case of any tax for which suit had theretofore been brought by the attorney general and for which judgment had been entered therein. As judgment was entered
201 in this action before the passage of that act, the defendant can have no benefit from its provisions.

Fourth. We see no reason to doubt that the defendant was liable to the penalties imposed by section two of the act of 1881 for neglecting to pay the taxes within the time specified therein.

We are reluctantly brought to the conclusion that the judgment below cannot be reversed. If it be true that as against all other corporations but this defendant and two or three others the taxes have been computed upon the basis of the capital employed in this State, then the defendant has good reason to complain of unjust discrimination, and it may very properly appeal to the Legislature for the relief which it has failed to obtain elsewhere. A great State can afford to be both just and magnanimous, and it is certainly against a sound public policy to treat with injustice foreign corporations who come to our great metropolis to transact their business and thus add to the prosperity, wealth, and importance of
202 our State.

Our conclusion is that the judgment should be affirmed with costs.

"All concur except Peckham, J., dissenting, & Rapallo, J., not voting."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

Endorsed: People ag'st Horn Silver Mining Co. Opinion. Earl, J. For committee on taxation of senate. Charlton T. Lewis, Esq. 4.75.

203 UNITED STATES OF AMERICA:

STATE OF NEW YORK, } ss:
County of Albany, }

To the justices of the Supreme Court of the United States, Greeting:

By virtue of the foregoing writ of error and in obedience thereto, I, Robert H. Moore, clerk of the said county of Albany, and as such by law the clerk of the supreme court of the State of New York in and for the county of Albany, in the third judicial department, and with whom the record and proceedings and also the final judgment or decree of that certain plea in the foregoing writ of error mentioned and described which was in the court of appeals of the State, was, upon the rendition by said court of appeals of such final judgment or decree, required to be filed and entered and was and is filed and entered and remains of record in my said office, do hereby make return of said writ and transmit a true copy of said record and of the assignments of error and of all proceedings in the case under my hand and the seal of said court, and do hereby certify that the within and foregoing pages, numbered from 1 to 197, inclusive, contain a true and complete transcript of the rec-
204 ord and proceedings, and also the final judgment and decree had in said court of appeals, which was and is the highest court of said State of New York in which a decision could be had in the said suit, and also in the said supreme court of the State of New York, in the said case of The People of the State of New York, defendant in error, against The Horn Silver Mining Company, plaintiff in error, as the same were had in said court of appeals, and were thereupon by the said court of appeals duly remitted into the said supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be then enforced according to law, and which record and proceedings now remain in the said supreme court, before the justices thereof, as the same now remain of record and on file in my said office.

In testimony whereof I have hereunto caused the seal of the said supreme court of the State of New York to be hereunto affixed, at the city of Albany, in said county of Albany, in the northern district of New York, in the second circuit of the United States, this 20th day of March, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

[Seal Albany County, July, 1888.]

ROBERT H. MOORE, *Clerk.*

205 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HORN SILVER MINING COMPANY.

I hereby certify that I have settled the case on appeal in the action as within, no amendments having been submitted to the defendant's proposed case.

Dated September 1, 1885.

I. LAWSON, *Referee.*

We hereby consent that the within be filed as and for the case on appeal herein.

Dated September 1, 1885.

D. O'BRIEN,
Attorney General, Pl'ffs' Att'y.
DAVIES, COLE AND RAPALLO,
Attorneys for Def't & Appellant.

On the foregoing certificate and consent it is hereby ordered that the within be filed as and for the case on appeal herein.

Dated September 1st, 1885.

I. LAWSON, *Referee.*

Endorsed on cover: New York supreme court. No. 353. The Horn Silver Mining Company, plaintiff in error, *vs.* The People of the State of New York. Filed April 18, 1888.

FILED
OCT 17 1891

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 48.

THE HORN SILVER MINING COMPANY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF PLAINTIFF IN ERROR AND APPENDIX OF STATUTES.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891—No. 48.

THE HORN SILVER MINING COMPANY,
Plaintiff in Error,

AGAINST

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This action was originally brought by the people of the State of New York against the Horn Silver Mining Company, in the Supreme Court of that State, to recover upon two causes of action; the first, a claim for $7,500 with ten per centum penalty for non-payment, as a tax under the provisions of section 3, Ch. 542 of Laws of 1880, as amended by Ch. 361 Laws of 1881 (known as the General Corporation Tax Law), for the year ending November 1st, 1881; the second a claim for $30,000 with ten per centum penalty for non-payment, as a tax under the same statute for the year ending November 1st, 1882 (folio

3). The plaintiff recovered a judgment against the mining company for $42,159.75 (folio 83). This judgment was affirmed at General Term of the Supreme Court of New York (folio 153) and by the Court of Appeals (folio 155) and the decision of the latter Court was duly made the judgment of the Supreme Court (folio 156). Whereupon a writ of error to this Court was duly allowed (folio 168).

The plaintiff in error was during the years 1881 and 1882 a corporation duly incorporated and organized under the laws of the Territory of Utah, and was therefore, as to the State of New York, a foreign corporation (page 14, fol. 25).

The principal place of business of the plaintiff in error was fixed by its articles of incorporation at Frisco, Beaver County, Territory of Utah (p. 14, fol. 25).

Its entire capital stock of ten millions of dollars was issued in payment for real estate situated in Utah and in Illinois, said real estate consisting entirely of mining property and improvements and a refinery (p. 19, fol. 34).

The business which the plaintiff in error was chartered to transact was, as fixed by its articles, *mining in Grampion Precinct, San Francisco Mining District, Beaver County, Utah Territory*, and the buying, selling, leasing and operating mines and mining claims in the territory of Utah, and smelting, reduction and refining works in said territory or elsewhere, the conducting a general mining, milling, and smelting business in all its branches, including buying and selling mineral ores and bullion; the carrying on a general mercantile business by buying and selling such goods, merchandise, stores and miners' supplies as are usually kept in and required by the wants of a mining camp or settlement; the building and operating all such roads, tramways and transportation routes as may be conveni-

ent in transporting the products of its business or procuring supplies, purchasing, hiring and holding all such real and personal property, wherever situate, as may be required in carrying on any of its business, and when no longer required for business purposes, leasing, selling or exchanging the same, and generally to do all acts and things incidental to a general mining business or to any of the aforesaid pursuits; *and the immediate purpose for which the plaintiff in error was primarily formed was for working and developing the estate, property, and premises known as the Horn silver mine and the treatment and reduction of the ores and metals therein contained* (p. 15, fol. 26)

Its operations in Utah consisted in mining the ore and manufacturing it into base bullion. All the product of the mines was manufactured by the company into rough bullion bars in Utah.

The plaintiff in error had a refinery at Chicago, to which the rough bullion bars were transported, and where the lead in the base bullion was separated from the silver and bullion silver bars and refined lead were made. These bullion bars were then transported to the company's office in New York. The president and the treasurer of the plaintiff in error had their offices in New York, and the directors had their annual meetings there. The company did very little correspondence from its New York office. It deposited moneys in a bank in New York. Some money was temporarily loaned in New York, and dividends were paid there and the stock was transferred there. The principal business that thecompany did in New York was sell ing its silver bars. The bars were delivered by the express company by order of the mining company to the United StatesGovernment Assay Office in New York (fol. 91). They were weighed and a receipt issued in this form (fol. 125):

Silver Bullion Receipt.

No. 1804. ASSAY OFFICE OF THE UNITED STATES,

NEW YORK, Dec. 17th, 1883.

Received from W. S. Hoyt, Secty., a deposit of silver bullion for bars, weighing eighty-one hundred and ninety-two ounces, *the net value thereof to be ascertained and paid to said depositor or order.*

SAM. H. GOOHAN,
for Superintendent.

Ozs., 8192.

After the assay office had ascertained the net value of these bars, a further certificate would be issued showing what that net value was, to which the depositor or his transferee was entitled (fol. 126). The company would then transfer this obligation of the assay office to pay the net value of its bars, to a purchaser who would be entitled to refined silver bars in discharge of the obligation (fols. 90–95).

The average amount of money in cash on hand deposited in bank in the State of New York belonging to the plaintiff in error during the year ending November 1st, 1881, was $29,188.63, and the average amount of bullion within the State of New York during that year was $26,641.99; the average amount of money loaned within the State of New York during said year was $50,250; the value of the office furniture within said State during said year was $500 (fol. 34, p. 19).

The average amount of money in cash on hand in the State of New York belonging to the plaintiff in error during the year ending November 1st, 1882, was $40,345.65, and the average amount of bullion in the State of New York during that year was $51,555.41; and the average amount of money loaned within the State of New York during the year ending November 1st, 1882, was $287,407.14. The value of the office

furniture within the State of New York during the year 1882 was $500 (fol. 45, p. 25).

The tax imposed for the year ending November 1st, 1881.

The capital stock of the plaintiff in error was appraised at its actual value in cash at $5,000,000. As the dividends were less than six per cent., the statutory rate of one and one-half mills upon each dollar of the valuation of the capital stock was applied, making the tax $7,500 (L. 1880, Ch. 542, as amended by L. 1881, Ch. 361, § 3).

The tax imposed for the year ending November 1st, 1882.

The nominal par value of the capital stock of plaintiff in error, upon which dividends were declared, was $10,000,000. The rate per annum of the dividends was 12 per cent. As the dividends were therefore this year greater than six per cent., the statutory rate of one-quarter mill upon the par value of the capital stock for each one per centum of dividends declared was applied. The rate of tax therefore was three per cent. upon said $10,000,000, making the amount of the tax $30,000 (L. 1880, Ch. 542, as amended by L. 1881, Ch. 361 § 3) (fol. 43, page 24).

The Court gave judgment against the plaintiff in error for the sum of $7,500 for the tax for the year 1881, together with $750 penalty (fol. 56, page 32), and for $30,000 for the tax for the year 1882, together with $3,000 penalty (fol. 59, page 34), making a total of taxes and penalties of $41,250 of the years 1881 and 1882.

Assignments of Error.

The errors claimed are (fol. 169, p. 95):

I. That Laws of 1880, Chapter 542, as amended by Laws of 1881, Chapter 361, and the authority attempted to be exercised in the State of New York and dependent upon said statute are repugnant to the Constitution of the United States, in that the taxation of the plaintiff in error under said statute.

A. Was a deprivation by said State of the property of the plaintiff in error without due process of law, and

B. Took the private property of the plaintiff in error for public use without just compensation, and

C. Was a denial to the plaintiff in error by the State of New York of the equal protection of its laws, and

D. Was a regulation of commerce among the several States, and

E. Interfered with the sovereignty of the State of Utah, and

F. Taxed property and business without the jurisdiction of the State of New York, and

G. That the Court decided against the titles, rights, privileges and immunities especially set up and claimed by the plaintiff in error under the Constitution of the United States (see refusals of the Referee on this trial to find in plaintiff's favor on these constitutional points, at folios 38 to 40 and 48 to 50, and the exceptions to such refusals at folios 64 and 67).

H. That said statute and the authority attempted to be exercised thereunder are repugnant to the Constitution of the United States, because of the facts set forth in the answer to the complaint (fols. 14 to 24, pages 8 to 14), and because said statute establishes an unjust and unequal system of taxation in that it attempts to fix the amount of tax to be paid by the plaintiff in error wholly without regard to the extent of corporate franchises exercised by it within the State of New York,

and without regard to the amount of business done by it within the State of New York, the amount of capital employed in the State of New York, or the amount of property owned by it and situated in the State of New York, and without regard to the amount of its capital stock owned and held in the State of New York, and without regard to the extent of the protection and benefits derived from the laws or agencies of the State of New York, and because it seeks in effect to tax property and persons not within the jurisdiction of the State of New York or in any way subject to its authority, and violates principles of equality and uniformity.

II. The plaintiff in error also assigns the same errors to the State Court in respect to said statute of 1881 *as amended by Laws of 1882, Chapter 151*, as it has assigned in respect to said statute (fol. 174, p. 97.)

THE CASE OF THE
HOME INSURANCE COMPANY VS. NEW YORK
(119 U. S., 129; 134 U. S., 594).

This is the *only case* in this Court where any of the statutes at bar have been considered.

In that case the claim of the Home Insurance Company (a *domestic* corporation) was that so much of L. 1880, Ch. 542, as amended by L. 1881, Ch. 361, as required a tax to be paid upon its capital stock without deducting from the amount so to be paid a sum bearing the same ratio thereto as the amount of the paid-in capital stock of the said company, invested in bonds of the United States, bore to the total amount of its paid-in capital stock was unconstitutional and void (see Record in Home case, fol. 14, p. 5).

The case was affirmed by a divided Court (119 U. S., 129), and was reheard "because an important constitutional question was involved" and upon

the rehearing was affirmed (134 U. S., 594). Mr. Justice HARLAN, and the late Mr. Justice MILLER, dissented upon the sole ground that notwithstanding the peculiar language of the Statute of New York the tax in controversy was in effect a tax upon bonds of the United States held by the Insurance Company.

The only other contention made by the plaintiff in error or considered by this Court was that the Home Insurance Company was denied the equal protection of the laws. Counsel claimed that

"The tax upon corporations declaring less than "six per cent., as has been seen, is a tax upon "their property, and they are entitled to deduct "from the assessment the amount of their United "States bonds. This is incontrovertible (Bank Tax "Case, 2 Wallace, 200). Unless, then, those declar- "ing over six per cent. are allowed the same de- "duction, are relieved from taxation to the extent of "their United States bonds, the tax is unequal and "therefore unconstitutional" (Brief of Plaintiff in error in Home case, p. 18).

But this Court held that under the New York statute all corporations, joint stock companies and associations of the same kind were subjected to the same tax, and that the same rule was applicable to all under the same conditions in determining the rate of taxation, and that there was no discrimination in favor of one against another of the same class. But it was a *domestic* and not a *foreign* corporation which was then before the Court.

It is thus seen that the scope of the questions before this Court in the Home case did not embrace the matters now before the Court for determination (see Statement and Specification of Errors above).

The Court of Appeals has sustained these Statutes of 1880 and 1881 against all constitutional objections. The Court has said: "In this Court it must be deemed

settled that the Statute of 1881 does not violate any provision of the Constitution of the United States."

The People vs. The Gold and Stock Tel. Co., 98 N. Y., 67, 73.

Again, in the case at bar, the Court said: "The constitutional objections to the acts under which these taxes were imposed have been sufficiently considered in prior decisions of this Court, and the acts must now be regarded as free from constitutional objections, and therefore, valid" (Record, p. 101, fol. 184).

Point I.

THE TAXES IN QUESTION ARE NOT LICENSE TAXES IMPOSED UPON A FOREIGN CORPORATION AS A PRE-REQUISITE OF DOING BUSINESS IN THE STATE OF NEW YORK.

(a) *The New York Statutes impose a tax for revenue. Their purpose is to do this, and they are enacted under the taxing power. They are not license laws, enacted under the police power of the State. These taxes are not the price of a permit to do business within the State, the payment of which is a condition precedent to the transaction of such business. They are to be judged therefore as tax laws.*

The title of the Acts of 1880 and 1881 is,

"An Act *to provide for raising taxes* for the use of the State upon certain corporations, etc." The Constitution of the State of New York makes the title of an act in some cases of controlling importance, and it is held to be a "legitimate" subject for consideration in "determining the intent of special legislative action."

People *ex rel.* West. F. I. Co. vs. Davenport, 91 N. Y., 585.

The statute provides that the corporations affected "shall be subject to pay a *tax*, as a *tax* upon its corporate franchise or business." Sec. 3, L. 1881, Ch. 361.

The statutes have been treated solely as an exercise of the taxing power by the New York Courts in the Equitable Trust case (96 N. Y., 388), and in all other cases involving their consideration.

"The statutes in question left the corporations still "subject to the payment of local taxes, always con- "stituting the great bulk of taxation in the State, and "attempted by a new system to collect only or such "of the burdens laid upon them as insured exclusively "to the use of the State, by tax upon their franchises "alone."

People vs. Home Ins. Co., 92 N. Y., 339.

"It inaugurates a new *system for the taxation* of a "certain specified class of corporations."

People vs. Spring Valley Hydraulic Gold Co., 92 N. Y., 386.

See also People vs. Gold and Stock Tel. Co., 98 N. Y., 67.

That it is not a license law is further apparent from the fact that no privilege is granted by it. It does not provide for a "sum paid for a permit." Compliance with its terms gives no rights. If it be true that a State may arbitrarily and at any time terminate the right of a foreign corporation to do business within its borders, the State of New York may stop the business of a foreign corporation in this State immediately after payment of the tax prescribed, as well as before. The act gives no license to foreign corporations upon payment of the tax. If they are here on sufferance only when the tax accrues, they are still here on sufferance only after paying the tax.

In the case of the Trustees vs. Roome, 93 N. Y., 330, the Court held the tax there considered to be a

condition or license fee rather than a tax, and the price of admission to this State. Although it was payable after such admission, and after the certificate given, yet the Court held that the special requirement that the payment was required to be secured by a bond given at the time of admission, and as a condition precedent to the issue of the certificate, distinguished it from ordinary taxation, and stamped its character as a condition. But in the law now under examination there are no such requirements.

A license fee is imposed as a condition of privilege granted. Such license fee must be accompanied by some grant of privilege, upon condition of its payment.

Cooley on Taxation, 407.
Burroughs on Taxation, § 48.
Mayor, &c., vs. Charlton, 36 Ga., 462.

The language of Mr. Justice BLATCHFORD in Fire Association of Philadelphia vs. New York, 119 U. S. 110, shows distinctly the difference between a license fee which is a pre-requisite to doing business for the future and a tax.

"This Pennsylvania corporation came into the State "of New York to do business by the consent of the "State, under this Act of 1853, with a license granted "for a year, and has received such license annually, to "run for a year. It is within the State for any given "year under such license, and subject to the conditions "prescribed by statute. The State, having the power "to exclude entirely, has the power to change the con-"ditions of admission at any time for the future, and "to impose as a condition the payment of a new tax, or "a further tax, as a license fee. If it imposes such "license fee as a prerequisite for the future, the foreign "corporation, until it pays such license fee, is not ad-"mitted within the State or within its jurisdiction. It "is outside, at the threshold, seeking admission, with "consent not yet given."

Of a law similar to that construed in that case (reported in New York Court of Appeals at 92 N. Y., 311), the Court said it was "in the nature "of a license *or condition of entering this State* and "transacting business within its limits."

Phœnix Ins. Co. vs. Welch, 12 Ins. L. J., 502.

See also Comm. vs. Conglomerate Mining Co., 13 W. N. C., 522.

In the case of Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181, the law of Pennsylvania provided that from and after a certain date, which was anterior to the time the Company took an office in Pennsylvania, no foreign corporation should have an office in Pennsylvania, unless it should have *first* obtained an annual license to do so by the payment of a "license fee." That case is therefore not relevant to this.

"There is a clear distinction between a license, granted or acquired as a condition precedent before a certain thing can be done, and a tax upon the business which that license may authorize one to engage in."

Home Ins. Co. vs. Augusta, 50 Ga., 537.
Erie R'w'y. Co. vs. State, 31 N. J. L., 543.

The criterion of the amount imposed upon the corporations shows the law to be an exercise of the taxing power.

Van Hook vs. Selma, 70 Ala., 361.

In the Standard Oil case (101 Penns.), arising under the statute from which the New York law was copied, the Supreme Court of Pennsylvania say:

"The tax in this case is in no sense a license tax. The State never granted a license to the Standard Oil Company to do business here."

In the case of *County of San Mateo vs. Southern Pacific R. R. Co.*, in order to sustain the provision as to

taxation of railroads, and to avoid the restrictions upon the power of taxation, it was urged "that under the State Constitution the Legislature is authorized to alter or repeal the laws under which corporations are formed, and that this mode of taxing corporations, in effect, operates as an amendment of the act authorizing the formation of corporations, and that corporations hold their franchises in subordination to that provision." This suggestion was rejected for several reasons, one of which is exactly in point here. Says Judge SAWYER: "The proceeding in question is either taxation or something else; either an exercise of the sovereign right of taxation, or the exercise of some other power; either taxation or not taxation. *The provision, in terms, purports on its face to provide for taxation.* The convention that framed the article, and the people, when they adopted it, evidently must have supposed they were providing a scheme of taxation. The provision admits of no other construction. * * * It is clear to me, therefore, from these considerations and the express terms themselves of the constitution, that the provisions in question attempt to provide only for exercising the sovereign power of taxation; has no other end to accomplish, and accomplishes no other purpose; and that the rights of the parties must be determined on that hypothesis alone."

The Railroad Tax Cases, 13 Fed. Rep., pp. 775 and 777.

See also opinion of Mr. Justice Field. in the same case, at page 754.

Also County of Santa Clara vs. Southern Fac. R. R. Co., 18 Fed. Rep., 438, 439, 440.

An examination of the complaint in the case at bar will show that further language of Judge SAWYER in the

San Mateo case may also be adopted in this connection, as follows:

"Again, this suit is for a tax and nothing else. It "proceeds upon that idea, and the idea alone, that a "valid tax has been assessed against the defendant, "which this action is brought under the statute to "recover. The suit cannot be maintained upon a lia- "bility imposed under other and different provisions of "the Constitution. If it cannot be maintained as for "a tax, it must fail."

The Railroad Tax Cases, 13 Fed. Rep., p. 779.

The language in Hynes vs. Briggs, 41 F. R., 470, is pertinent. Here the Court said: "It is competent for "the Legislature to declare on what terms foreign cor- "porations may do business in the State, but the "statute under consideration was not an act for that "purpose. *To make it such would be judicial legisla- "tion.*"

In the case of San Francisco vs. Ins. Co., 74 Cal. 103, we have an extended discussion upon the question whether a tax upon a foreign corporation should be regarded as a license, so as to take it out of the range of the principles of taxation:

"We come now to the inquiry, Is the exaction here in question a tax? *The statute itself denominates it a tax, and it must be confessed that it has all the characteristics of a tax. It is a charge imposed by the Legislature for the purpose of revenue.*

* * * * * * * *

"It is claimed that this is a sum paid by the corporation for the privilege of acting as such in this State, and therefore not a tax. The plausibility of the claim consists in apparently identifying this case with cases in which it is clear the exaction is a condition, and from which this is made to differ only in degree. If the condition had been that the corporation should pay a fixed sum for the privilege before it was allowed to do business at all, it would no doubt be held a condition, and not a tax; so perhaps if the license were required to be renewed at stated periods; and it has been held that, when the corporation is required to pay a percentage upon its receipts, and the payment is

required to be secured by a bond before the corporation is allowed to do business in the State, this special requirement distinguishes it from ordinary taxation and stamps its character (Trustees Exempt Firemen's Fund vs. Roome, 93 N. Y., 325; 45 Am. Rep., 217). *So the two classes of cases, one of which is plainly taxation, and the other a sum paid for a permit,* may be approximated until it is difficult or impossible to say to which class a given case may belong. These difficulties to discriminate the principles underlying different cases constantly included in different classes, and to which the same rule of decision cannot be applied, constitute the perpetual debating grounds of the law, and occasion much of the confusion in the decisions. But, as was remarked by Judge MARSHALL, because we cannot easily draw the line does not prove that there is no difference in principle. No one fails to note the contrast between the light of day and the darkness of night, but no one is able to draw the line between daylight and darkness, or note the precise instant when one ends and the other begins. I have said that the act on its face denominates the exaction a tax, and that it is imposed according to the methods of taxation. *It is also manifest from the fact that the chief reason of the tax is to raise money.* No one can read the law without being so impressed.

* * * * * * * *

Now, a business may be licensed and still be subject to be taxed. A license proper is a permit to do business which could not be done without the license. It is a mere permit. It may be thus licensed and then subject to a license tax. These licenses may not differ in form, but one is a license proper, and the other is a license tax imposed for the purpose of revenue.

This business, being first licensed, and then in a subsequent law subjected to a license in the form of a tax, the last law in no way intimating that the previous license is withdrawn unless the imposition is paid, the presumption is very strong that the exaction is for revenue purposes, and was not intended as a condition."

The Court held the exaction in question to be a tax.

(b) This law, therefore, can obtain no support from any assumed principle or rule of law that any burden may be imposed upon a foreign corporation as a condition of doing business in any State.

The law is a tax law and not a license law, as has already been insisted.

Laws passed under the principle referred to, are

enacted under the police power. They impose burdens as conditions, not as consequences, and the apparent purpose is the protection of the State and its citizens from outside agencies.

"It is not denied that the corporate existence "of a company is recognized, not by right but "of grace, in foreign jurisdictions, nor that each "government has the competence to refuse to "recognize such existence, except on its own "conditions. * * * Hence, laws requiring insur- "ance companies and other foreign corporations to "file bonds and submit to other exactions, as a pre- "requisite to their admission in an incorporated ca- "pacity into the State. * * * *But a tax law hav- "ing revenue for its object, is based upon a principle "entirely different.*"

Erie Railway Co. vs. State, 31 N. J. L., 543.

A State can alter or limit the rules of comity only by positive and express provisions.

Cowell vs. Springs Co., 100 U. S., 55.
Christian Union vs. Yount, 101 U. S., 352.
Insurance Co. vs. Morse, 20 Wall., 445.
Story on Confl. of Laws, § 38.
Merrick vs. Van Santvoord, 34 N. Y., 208.

But in this case there is nothing to show that the Legislature intended to exercise this power of modifying ordinary interstate comity. On the contrary, it is clear that it did not.

See State vs. West. Un. Tel. Co., 73 Me., 518.

The act is clearly only for the purpose of raising

revenue, and must take effect as an exercise of the taxing power only.

Mayor vs. Second Ave. R. R. Co., 32 N. Y., 261.

(c) The Legislature could not, because of its power to impose a burden upon foreign corporations as a condition of doing business, take money or property from a foreign corporation, already lawfully doing business here, by an absolute and unconditional demand.

It seems to be thought by some that the position of foreign corporations is such that they cannot question any action of the State concerning them, and that legislative action affecting them may be utterly arbitrary and unreasonable, without being open to objection. If this were correct, then the Legislature might have passed a law—different in form from the present and under the exercise of a different power—by which foreign corporations might be compelled to pay any arbitrary sums to the State. But it is not correct.

This Court, in Ducat vs. Chicago, 10 Wall., 410, said: "The power of the State to discriminate between her "own domestic corporations and those of other States "desirous of transacting business within her jurisdic- "tion, is clearly established in the case we have referred "to, as it also had been in the previous case of Bank "of Augusta vs. Earle, 13 Pet., 519. As to the nature "or degree of discrimination, it belongs to the State to "determine, *subject only to such limitations on her "sovereignty as may be found in the fundamental law "of the Union.*"

See N. Y., L. E. & W. R. Co. vs. Commonwealth, 129 Penns. St., 463.

The State may make the payment of money a condition either of beginning or of continuing business,

other than interstate business, within its limits; but it cannot, simply because it finds the corporation doing business within its borders, confiscate its property by an absolute and unconditional seizure.

In *Doyle vs. Continental Ins. Co.*, 4 Otto, 535, is this statement of the principle:

"The cases of *Bank of Augusta vs. Earle*, *Ducat vs. Chicago*, *Paul vs. Virginia* and *Lafayette Insurance Co. vs. French*, establish the principle that a State may impose upon a foreign corporation, *as a condition* of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper that are not repugnant to the Constitution or laws of the United States."

And further in the same case:

"The effect of our decision in this respect is that the State may compel the foreign corporation to abstain from the Federal Courts or to cease to do business in the State. *It gives the company the option.*"

The principle referred to was examined with especial care in this case, because it arose under the same statute as *Insurance Co. vs. Morse*, 20 Wall., 445. The Legislature of Wisconsin had passed an act requiring foreign insurance companies upon obtaining licenses to stipulate not to remove suits to the Federal Courts. In *Insurance Co. vs. Morse* the question was whether a removal could be made notwithstanding such stipulation. It was held that the stipulation could not be enforced. The same statute directed the Attorney-General to withdraw the license of any corporation which should remove a cause. In *Doyle vs. Continental Ins. Co.* it was held that the Court could not interfere to prevent such withdrawal.

The distinction is thus clearly drawn between conditions and unconditional burdens or requirements.

In this case the tax is not imposed as a condition.

The defendant is given no option. The act declares that every foreign corporation now doing business here shall, absolutely and unconditionally, pay certain money. The tax is a consequence, not a condition.

It will hardly be disputed that a corporation created by one State may do business in another by virtue of interstate comity unless prohibited by the law or established policy of the latter.

Cowell vs. Springs Co., 10 Otto, 55.
Christian Union vs. Yount, 11 Otto, 352.
Merrick vs. Van Santvoord, 34 N. Y., 208.
People vs. Fire Assoc. of Phila., 92 N. Y., 325.

(d) The taxes in dispute have not become binding by any assent upon the part of the plaintiff in error.

In the case of *People vs. Fire Association of Philadelphia*, 92 N. Y., 311, Judge FINCH, considering a law which clearly was passed under the power to exclude foreign corporations or to impose burdens upon them as conditions, says:

" The situation, then, is this: The State having the " power to exclude foreign corporations determines to " do so unless they will *submit* to certain conditions. " It meets the *applicant* on the border, forbidding " admission, as it has a right to do, except on condition " that it will fulfil all of the requirements of our stat- " utes, one of which is the very law here assailed. " When the corporation comes in it agrees to the con- " ditions. They become binding by its assent. The " tax or license fee charged by the act of 1865 is one " of these conditions. It is imposed as the price of " permission to come within the jurisdiction, and not " as a tax upon one already within the jurisdiction."

It may be claimed that the tax can be collected under this principle. But in this case the tax is " upon one already within the jurisdiction." The law finds the

Horn Silver Mining Company already doing business here.

If the third section of the act be cut down so as to contain only so much as applies to this company, it will read as follows:

"Every corporation now incorporated by or under "the laws of any other State and doing business in this "State, shall be subject to and pay a tax * * * "

There is no opportunity given for assent or dissent. The mandate is absolute.

By ceasing to do business the company could not escape the liability. By withdrawing its property from the State, it might have made it impracticable for the State to collect. But the liability, if any, was created by the act itself, beyond the possibility of escape by ceasing business or removing property. If the liability is to rest on assent the law must be clear and distinct in offering a condition for acceptance. If there be doubt, even, whether the law imposes a condition which may be avoided by giving up a privilege conditioned upon it, or an absolute burden wholly unconditional, there cannot be any assent by silence, such as to create a liability which without assent, that is without a contract, would not exist.

Moreover, this plaintiff in error is contesting the validity of the tax imposed. It certainly cannot, in this very action, be held to have assented to the tax. There is no substantial difference in this respect between a burden imposed on a foreign corporation already here and one imposed on a domestic corporation under the reserved power to alter charters. In the case of *County of Santa Clara vs. Southern Pacific R. R. Co.*, 18 Fed. Rep., 438, SAWYER, J., says: "But if the State, under its power to amend the laws under which corporations are formed, is entitled to impose this charge, not imposed upon natural persons and other corporations under like circumstances, as a condition of its continued future ex-

istence, the corporation is not bound to accept the condition and go on. No charter can be forced upon an association of natural persons, and no new or more onerous condition can be forced upon a corporation already formed. It may elect to dissolve and retire from the field of enterprise occupied rather than accept the new conditions; and such conditions might be imposed as would compel that course. *But until accepted they form no part of the charter, and impose no new valid obligation.* An acceptance of the new conditions cannot be presumed while the corporation is protesting that none have been imposed; or, if attempted to be imposed, is insisting that they are invalid, void, and of no effect; and in every way, and by all means in its power, is resisting the attempt of the State to give effect to this assumed change in its rights and obligations, while it is still denying the power of the State to make the change. Till the corporation elects to accept the new condition imposed, or gives sure evidence of such election, rather than dissolve, there is no implied promise or obligation to assume the additional burden laid upon it, or, as in this instance, to pay the additional tax thus imposed *in invitum*, upon which an action can be maintained. This corporation, like every other person against whom a right is claimed, certainly is entitled to litigate the question when any new valid obligations or conditions have been imposed upon it, before it can be called upon to determine whether it will dissolve or retire, or accept the conditions and proceed. A refusal to accept, surely, can give no right of action, which depends on acceptance."

In the case of San Francisco vs. Insurance Co., 74 Cal., 103 (1887), the Court held that the tax upon the foreign corporation was one for municipal purposes, and therefore in violation of the Constitution, which prohibited the Legislature from imposing taxes "upon counties, cities, towns or other public or municipal cor-

porations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes." The Court said: "*As to the proposition that the corporation waived the constitutional objection by continuing to do business after the passage of the act, it is enough, in my opinion, to say that it is a mere petitio principii. If the condition be void, no implied assent can be claimed.*"

Point II.

THE TAXES IN QUESTION, IN THE VIEW OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, WERE LAID UPON THE BUSINESS OF THE HORN SILVER MINING COMPANY TRANSACTED IN THE STATE OF NEW YORK.

That business consisted:

(1) Of selling to the United States, at its Assay Office in the City of New York, the silver bullion bars refined in Chicago from base bullion sent there from Utah, where the ore is mined and smelted into base bullion.

(2) Of transmitting a large part of the proceeds of the sales in New York to Utah.

(3) Of retaining the remainder of the proceeds of sales in the City of New York, loaning them and keeping them in bank until required for the payment of dividends, and then paying dividends in New York therefrom.

(4) Of maintaining an office for officers and directors.

Folios 87-96, Record.

It is obvious, from the testimony, that the transactions between the plaintiff in error and the United States Government were in fact sales to the United States of its silver bullion. The silver bullión in bars was taken directly to the United States Assay Office upon its arrival in New York; a document was obtained from the Assay Office in exchange for the silver bullion bars, by which it was agreed that the net value of the silver bullion deposited should be ascertained and paid to the depositor or order (fol. 125). It was testified that the company did not again receive its identical silver from the Assay Office. "But we receive the value of them" (fol. 88). The course of business of the plaintiff in error, and the only method by which it disposed of its silver bullion imported into the State of New York, was to turn it over to the United States Assay Office, and to receive receipts precisely similiar in form to the one proved in the case and set forth at folio 125. These receipts the plaintiff in error would dispose of for money after the value of the bars deposited had been ascertained and certified to by a document, the form of which is found at folio 126. The transferee of the receipt of the Government was then paid by the Assay Office in silver bars (fols. 87 to 95). These transactions are sales by the plaintiff in error, in the State of New York, of its silver bullion in the form in which it is brought into the State. The character of the transaction is not altered if it be considered that the plaintiff in error sells its silver bullion for the first time when it disposes of the receipt given to it by the United States Assay Office. An examination of the testimony will show that the purchaser of the receipt of the Assay Office withdraws from that office silver and gold, if any gold be contained in any particular parcel of silver bullion, to the precise amount in weight and value of that deposited with the Assay Office, less two per cent. as the commission of the Assay Office on the transaction.

The substantial facts are that the silver of the plaintiff in error is brought to the City of New York and sold and disposed of by it as silver. It is not mixed with the general property of the State until it is thus sold. The circumstance that the Assay Office does not turn out to the purchaser of the receipt the identical silver deposited by the plaintiff in error, leads to the conclusion that the sale is to the United States Government. It is obvious that all else that the plaintiff in error did in the way of business in the State of New York, during the years 1881 and 1882, in transmitting money to Utah, in retaining money in New York, loaning it, keeping it in bank, and paying dividends, and in maintaining an office, was incidental to the business of importing silver bullion into the State and selling it. But for the sale of the bullion and the possession of its proceeds, there would have been no money to transmit to the West, to loan, to keep in bank, to pay dividends with, and there would have been no occasion for an office, except, possibly, for the transfer of stock and the convenience of officers and directors, and the conduct of occasional correspondence.

It appears from an examination of the case of the Equitable Trust Company (96 N. Y., 387), as well as from the opinion of the Court of Appeals in this case (fol. 184) that but for the fact that this plaintiff in error did import silver bullion into the State of New York, and there sell it, plaintiff in error would have been held not to be a corporation, "doing business in this State," within the scope and intention of the Statutes of 1880 and 1881.

The Equitable Trust Company case was that of a Connecticut corporation, whose business was the nogotiating of loans on mortgages in the Western States and the purchase of obligations secured by mortgages in those States, and the selling of securities based upon those loans and obligations. During the year ending November 1st, 1881, being that for which the tax for

which it was sued was assessed, it did but little business and made but few loans, and its sales of securities were very light and mostly in foreign countries. During eight years prior to its being sued by the State of New York for a tax under the statutes which are now before this Court, it had an office for the transaction of business in the City of New York, but a very small portion of its property was within this State and very little of its business was done here. The company did not take the ground that it was not doing business in the State of New York within the meaning of the act, but the Court of Appeals intimated very plainly, in its opinion, at page 397, that if that position had been taken it would have held that the business of the Equitable Trust Company in the State of New York was of such a character that the company was not to be considered "as doing business within the State," within the meaning of the Statutes of 1881. The Court says this :

"It has not been denied that this corporation did "business in this State within the meaning of the act, "and hence we have been relieved from the necessity "of inquiring what it meant by the language 'doing "business' and 'corporate business' in this "act. Does it mean occasional or incidental "corporate business, or continuous business sub-"stantially through the year? Does a corpo-"ration that keeps an office in this State merely "for the record and transfer of its stock while it does "the business for which it was chartered elsewhere, do "its corporate business within this State within the "meaning of the statute? Does a corporation which "has an office in this State from which its officers give "some directions for the management of its corporate "business, all of which is done elsewhere, carry on its "corporate business in this State any more than an in-"dividual carries on his business in this State who is "engaged in the business of building a railroad in an-

" other State over which he exercises some control by " correspondence from his home here? Does not the stat- " ute, when it provides as the measure of the tax the " amount of dividends earned by the entire business of the " corporation, or the entire cash value of its capital " stock, mean by 'its corporate business' substantially " the whole or the main corporate business which it " was chartered to transact? These questions we " leave unanswered. Their solution, when properly " presented, may relieve this act of some of its features " which would seem to be arbitrary, oppressive and un- " just."

When the Court of Appeals heard the case of this plaintiff in error, it was reminded of this language in the Equitable Trust Company case, and it is obvious, from the language of the Court, that the sale of its imported silver bullion was considered by the Court as such a "substantial part of the regular business," that the corporation was considered within the grasp of the taxing Statutes, and would have been held beyond their reach but for that business. The Court says this :

"We cannot construe the words 'doing business in this State' to mean the whole business of the corporation within this State; and while we are not prepared to hold that an occasional business transaction, that keeping an office where meetings of the directors are held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation is held, would bring a corporation within this act; yet, when, as in this case, all these things are done, *and in addition thereto a substantial part of the regular business of the corporation is carried on here*, then we are unable to say that the corporation is not brought within the act as one 'doing business in this State.' There is no injustice in subjecting to taxation such a corporation *enjoying the benefits of our*

great mart, the advantages of our social order and the protection of our laws."

Clearly, the importation and sale of the silver bullion "in our great mart" of the City of New York, was the single element of fact in the case that was considered to bring this plaintiff in error within the scope of the Statutes of 1880 and 1881 as a corporation doing business within the State.

The Court of Appeals has construed the Statute of 1880, as amended by the Statute of 1881, providing that a corporation shall pay the taxes in question "as a tax upon its corporate franchise or business," and has concluded, in the case of the Home Fire Insurance Company, as this Court also concluded in that case, that this tax upon a domestic corporation is upon its franchise to be a corporation, and has decided that the tax in the case of a foreign corporation falls upon the business of the corporation done within the State of New York. In the Equitable Trust Company case, 96 N. Y., page 393, the Court says:

"The defendant, being a foreign corporation, could "not be taxed here in reference to its property situate "out of this State, and its business not done here. Nor "could it be taxed on account of its corporate fran- "chise, as that was not given by our laws, was depend- "ent upon the laws of the State of its creation, and "had no existence separate therefrom. A corporation "may, through its agents, extend its operations into "other States, and thus, metaphorically speaking, go "there; but it never really travels, and its franchises "exist only at the place of its domicile and residence."

The Court says further:

"If the proper construction of this act requires us "to hold that this tax was imposed upon all the busi- "ness of this corporation, it is, as I understand, con- "ceded by the Attorney-General that the tax cannot be "enforced. *We are of opinion that this was a tax im-*

"*posed upon the business of this corporation done within* "*this State.*"

In the case of this plaintiff in error the Court of Appeals said that it was "very clear that the whole capital stock, the same stock upon which dividends are declared and paid, is to be taken as the basis of taxation; and so we held in People vs. Equitable Trust Company, 96 N. Y., 387, where we said that 'we find no authority in this act for apportioning a tax upon such a corporation as this upon the amount of dividends earned in this State, or upon the amount of capital stock employed in this State.'"

The taxes in question, then, if the construction of the Court of Appeals be accepted, fall upon the business of the Horn Silver Mining Company done in the State of York during the years 1881 and 1882, measured by its entire capital stock taken at a valuation in the case of the tax for the year 1881, and measured by the rate of annual dividends multiplied upon the entire capital stock in the case of the tax for the year 1882. As that business is principally and primarily the business of importing silver bullion into the State of New York and there selling it, all other business being merely incidental thereto, the taxes in question fall upon transactions of that character.

POINT III.

THE BUSINESS OF BRINGING BARS OF SILVER FROM CHICAGO TO NEW YORK AND THERE SELLING THEM IS INTERSTATE COMMERCE.

It is settled law in this Court that traffic between the States and the importation of articles into a State and their sale is interstate commerce. It is

only necessary to quote the language of a few of the cases in which this principle has been asserted by this Court:

In Brown vs. Maryland, 12 Wheaton, 419, this Court held that:

An act requiring importers of foreign goods by the bale or package and other persons selling the same by wholesale to take out a license at price of $50 is repugnant to the clause of U. S. Constitution, forbidding State, without consent of Congress, to lay a duty on imports or exports except what may be absolutely necessary for executing its inspection laws, and to the clause giving Congress power to "regulate commerce with foreign nations among the several States and with the Indian tribes."

This Court held that a tax upon the sale or right of selling is in effect a tax upon the importation and upon the article itself, as it increases the cost, and the article is imported only for sale. Taxation is regulation necessarily, and may be carried to the point of prohibition.

This Court said: "Commerce is intercourse; one of its most ordinary ingredients is traffic.

"Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part."

In Paul vs. Virginia, 8 Wall., 168, Mr. Justice FIELD said, in holding that the issuing of a policy of insurance was not a transaction of commerce:

"The policies are simple contracts of indemnity "against loss by fire entered into between the corpora- "tions and the assured for a consideration paid by the "latter. These contracts are not articles of commerce "in any proper meaning of the word. They are not "subjects of trade and barter offered in the market as "something having an existence and value independent "of the parties to them. *They are not commodities to "be shipped or forwarded from one State to another, and "then put up for sale.*"

In the Daniel Ball vs. The United States, 10 Wall., 557, the Court says:

"Whenever a commodity has begun to move as an "article of trade from one State to another commerce "in that commodity between the States has com- "menced."

In Mobile City vs. Kimball, 102 U. S., 691, Mr. Justice FIELD says:

"Commerce into foreign countries and among the "States, strictly considered, consists in intercourse and "traffic, including in these terms navigation and the "transportation and transit of persons and property, "*as well as the purchase, sale and exchange of com-* "*modities.*"

Mr. Chief-Justice FULLER, in Leisy vs. Hardin, 136 U. S., 100, is felicitous in his statement:

"Hence, inasmuch as interstate commerce, consist- "ing in the transportation, purchase, sale and exchange "of commodities, is national in its character, and must "be governed by a uniform system, so long as Congress "does not pass any law to regulate it, or allowing the "States so to do, it thereby indicates its will that such "commerce shall be free and untrammeled."

2d. A foreign corporation is entitled to the same freedom in carrying on interstate commerce as citizens of the several states.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

Gloucester Ferry Co. vs. Penns., 114 U. S., 196.

Philadelphia & So. Steamship Co. vs. Penns., 122 U. S., 326.

POINT IV.

THE STATUTES IN QUESTION REGULATE INTERSTATE COMMERCE IN SO FAR AS THEY TAX PLAINTIFF IN ERROR FOR ITS BUSINESS DONE IN THE STATE OF NEW YORK DURING THE YEARS 1881 AND 1882, AND THEREFORE ARE INVALID TO SUSTAIN THE TAXES FOR WHICH JUDGMENT HAS BEEN RECOVERED.

The Constitution of the United States provides, in Article I., Section 8, that "The Congress shall have power * * * 3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

This Court has settled repeatedly the principle that, until Congress has placed restraint upon commerce among the States, it is free, and that the want of action by Congress upon this subject is equivalent to its action providing for its freedom.

The supremacy of Congress in this field of legislation is enunciated in the recent case of *In re* Rahrer, 140 U. S., 545, as follows:

"By the adoption of the Constitution the ability of "the several States to act upon the matter solely in "accordance with their own will was extinguished, and "the legislative will of the General Government sub-"stituted" (page 561).

The question as to whether or not there is a violation of the commercial clause must be settled in each case, and this upon a view of the particular rights involved.

"The line which separates the powers of the States "from this exclusive power of Congress is not always "distinctly marked, and oftentimes it is not easy to "determine on which side a particular case belongs. "Judges not unfrequently differ in their reasons for a "decision in which they concur. Under such circum-"stances it would be a useless task to undertake to fix

" an arbitrary rule by which the line must in all cases
" be located. It is far better to leave a matter of such
" delicacy to be settled in each case upon a view of the
" particular rights involved."

Waite Ch. J. in Hall vs. De Cuir, 5 Otto, 95 U. S. 485.

In determining the unconstitutionality of the action of a State in laying a particular tax the question is not whether the statute relied upon in all cases regulates interstate commerce, but whether the effect of the tax in the particular case at bar is a regulation of interstate commerce.

Thus the same statute was before this Court in the case of the Pembina Mining Co. vs. Penn., 125 U. S., 181, and Norfolk & W. R. R. vs. Penn., 136 U. S., 114.

In the former case the tax was held not to contravene the commercial clause, and in the latter to contravene it. In the former case the facts showed that the foreign corporation had an office in Philadelphia for " the use of its officers, stockholders, agents and employees " and Mr. Justice FIELD, in stating the opinion, said: " A license tax only is exacted as a condition of " its keeping an office within the State *for the use of* " *its officers, stockholders, agents and employees*, nothing " more and nothing less; and in what way this can be ' considered as a regulation of interstate commerce is " not apparent."

In the latter case, on the other hand, it was first determined that the company was engaged in interstate commerce and then the tax, although only a license tax for the privilege of keeping an office in the State, was held a tax upon the means and instruments of the foreign company's interstate commerce.

It is well settled in this Court that a State cannot regulate commerce among the States even by means of the enactment of a license upon foreign corporations or individual citizens for the privilege of transacting business in the State.

" Whatever power may be conceded to a State, to
" prescribe conditions on which foreign corporations
" may transact business within its limits, it cannot be
" admitted so far as to prohibit or regulate commerce
" among the states, for that would be to invade the
" jurisdiction which, by the terms of the Constitution
" of the United States, is conferred exclusively upon
" Congress."

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

It is to be observed with regard to the Pembina Mining Company case. that an examination of the record discloses, that not only was there no proof of any interstate commerce business, and no proof of transportation and sale of silver or any other commodity in the State of Pennsylvania, but the plaintiff in error insisted that all the business of the company was done outside of the State of Pennsylvania, and that therefore Pennsylvania could not impose the license fee in question.

It also appears that the tax sought to be recovered by the State of Pennsylvania from the Pembina Mining Company was a license fee which, by the statute, was obliged to be paid as a condition of maintaining an office in the State of Pennsylvania. The Pembina Mining Company case, therefore, is not an authority against the plaintiff in error in this case.

Under the statutes at bar a tax is imposed upon the plaintiff in error under such circumstances and with such effect as to constitute it a regulation of interstate commerce, and it is therefore void.

" But since the case of Brown vs. Md., 12 Wheaton,
" 419, it has been repeatedly decided by this Court,
" that when a law of a State imposes a tax, under such
" circumstances and with such effect as to constitute it
" a regulation of commerce, either foreign or interstate,

" it is void on that account (Tel. Co. vs. Texas, 105 U.
" S., 460, and cases there cited)."
Moran vs. New Orleans, 112 U. S., 69.

The Statute of Pennsylvania from which the Statutes of New York under discussion were taken has been declared by this Court to be unconstitutional in its effect upon a foreign corporation carrying on interstate commerce.

Gloucester Ferry Company vs. Pennsylvania, 114 U. S., 196. The plaintiff was incorporated by New Jersey, and established a steam ferry from Gloucester across the Delaware to Philadelphia. It owned no property in Philadelphia, except the lease of a slip or dock. Its entire business consisted in ferrying passengers and freight across the river. Pennsylvania endeavored to tax the company under the Act of June 7th, 1879, providing that every company, *domestic and foreign*, doing business in the commonwealth, or having capital employed therein, except certain designated corporations, should pay the annual *tax of half a mill upon the capital stock* for each one per cent. of dividend if the company declared six or more than six per cent. dividends. If no dividends were made, or less than six per cent. dividends were made, the tax was at the rate of three mills upon each dollar of valuation of the capital stock. The Court held that the business of the company was commerce between the States, and that it made no difference whether such commerce was carried on by individuals or corporations.

(1) The subject of the tax is business done within the State of New York, but the business of the plaintiff in error is, as has been shown, interstate commerce, and the business done in New York is an ingredient of such interstate commerce; and if so, the tax upon such ingredient is void.

In Brown vs. Maryland, 12 Wheaten 419, this Court said :

" There is no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold.

" It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State, but while remaining the property of the importer in his warehouse, in its original form, a package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

" A tax on the occupation of an importer is in like manner a tax upon importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution."

Mr. Justice BRADLEY says in Phil. & So. Mail S. S. Co. vs. Penn., 122 U. S., 326 :

" As a tax on transportation, we have already seen " from the quotations from the State Freight Tax " case that it cannot be supported where that transpor- " tation is an ingredient of interstate or foreign com- " merce, even though the law imposing the tax be ex- " pressed in such general terms as to include receipts " from transportation which are properly taxable."

And again in referring to the case of Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, the same learned Justice says : " It is hardly necessary to add " that the tax on the capital stock of the New Jersey

" Company in that case *was decided to be unconstitu-*
" *tional, because, as the corporation was a foreign one,*
" *the tax could only be construed as a tax for the priv-*
" *ilege or franchise of carrying on its business, and that*
" *business was interstate commerce.*"

" We have repeatedly held that no State has the
" right to lay a tax on interstate commerce in any
" form, whether by way of duties laid on the trans-
" portation of the subjects of that commerce or on the
" receipts derived from that transportation, *or on the*
" *occupation or business of carrying it on*, for the reason
" that such taxation is a burden on that commerce and
" amounts to a regulation of it, which belongs solely to
" Congress."

See also

Welton vs. St. of Missouri, 91 U. S., 275.
Robbins vs. Shelby County Taxing District, 120 U. S., 489.

The case of Carson vs. Maryland, 120 U. S., 502, presents features that render it a *controlling authority* in the disposition of the case at bar.

In that case the Code of Maryland provided that no person or corporation other than the grower, maker or manufacturer should sell any goods within a State without first obtaining a license, the price for which depended upon the amount of the applicant's stock of goods generally kept on hand by him, or the concern in which he was engaged at the principal season of sale. The rate to be paid for the license was graduated according to the sworn statement of the applicant's stock in trade at the principal season of sale.

A., a citizen and resident of New York, was indicted under this statute for offering and selling, by sample, in Baltimore, without first obtaining a license, goods for a New York firm to be shipped by them directly to the purchasers in Baltimore.

Held, that these enactments as applied to A. violated

the interstate commerce clause. Judge BRADLEY delivered the opinion of the Court, deciding that the law was unconstitutional on the authority of the Robbins case. Chief-Justice WAITE, Justices FIELD and GRAY concurred on the following grounds:

"It is not denied that the Statute of Maryland requires a non-resident merchant desiring to sell by sample in that State to pay for a license to do that business a sum to be ascertained by the amount of his stock in trade in the state where he resides, and in which he has his principal place of business. This differs materially from the Statute of Tennessee, which was considered in Robbins vs. Taxing District of Shelby County just decided, *and is in its effect, as we think, a tax on commerce among the States. The charge for the privilege to the non-resident is measured by his capacity for doing business all over the United States, and without any reference to the amount done or to be done in Maryland.*"

In Fargo vs. Michigan, 121 U. S., 230, the State of Michigan imposed a tax upon the gross receipts of a transportation company engaged in furthering the transportation of freight between Michigan and other States. The company had no receipts other than from its interstate business. The Court held that this statute was a tax upon commerce among the States, and, therefore void.

"The States cannot be permitted, *under the guise of a tax upon business transacted within their borders to impose a burden upon commerce among the States, when the business so taxed is itself interstate commerce.*"

The Court holds that the act is unconstitutional in its operation upon the transportation company as it imposes a tax upon the gross receipts of the company on account of goods transported by it in the State of Michigan, the bill stating that the company carried no freight, the transportation of which was between points exclusively within that State. The Court distinguishes

the Gross Receipts case from the State Freight Tax case on the ground that in the Gross Receipts case the corporation was a creation of the Legislature of Pennsylvania, holding its franchises from that State, and that the tax was on the franchises derived from that State, and that in determining the mode in which the State could tax the franchises which it had conferred it was not limited to a fixed sum upon the value of them, but it could be graduated by a proportion to either the value of the privileges granted or the extent or results of their exercise.

The Gross Receipts case also, the Court held, presents the feature of the tax falling upon the freight money after it had become mingled with the common funds of the corporation. The Court then distinguishes between the Gross Receipts case and the case at bar on the two considerations that differentiate the Gross Receipts case from the State Freight Tax case.

"The proposition that the States can, by way of a *tax upon business transacted within their limits*, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But *where the business so taxed is commerce itself*, and is commerce among the States or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way."

In Philadelphia and S. S. Co. vs. Penns., 122, U. S., 326, the Gross Receipts case is distinctly overruled, and the ground taken in that case that the re-

ceipts from freight were taxed after being mingled with other property is held untenable.

Lyng vs. Michigan, 135 U. S., 161.

"We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, *or on the occupation or business* of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

2. The interstate commerce of the plaintiff in error is interfered with and hampered directly and indirectly by the tax in question.

It is sufficient, as has been shown, for the tax to be upon interstate commerce to render it void. This is a regulation. But such regulation will be more clearly seen when we determine that the commerce is directly or indirectly interfered with and hampered by the tax. This may be said to be one of the tests of "regulation" (Phil. S. S. Co. vs. Penn., 122 U. S., 326).

The plaintiff in error mines its silver and lead in the Territory of Utah. It moves these commodities in an unfinished condition to other States for the purpose of their further refinement, and for the purpose of traffic in them ("whenever a commodity has begun to move "as an article of trade from one State to another, 'commerce in that commodity between the States has, "commenced." Norwalk & W. R. R. Co. vs. Penn., 136 U. S., 114.) This interstate commerce is enabled partly to be carried on by the opening of an office in New York, from which office is regulated the transportation to New York and the receipt there of these commodities for purpose of sale. The purpose of this office is "manifestly for the furtherance of its business interests

" in the matter of its commercial relations " (*Ib.*). This office and the officers and employees so engaged in interstate commerce receive the protection to their interstate business of the State of New York, and that State undertakes to lay upon such business a tax.

In common parlance no one would speak of this office and these officers and employees as engaged in anything except in importing and bringing into the State of New York commodities from Utah through Illinois for trade and traffic in them. They are engaged in a commercial intercourse between Utah, Illinois and New York, and the business in New York is an essential ingredient in such intercourse.

The object and effect of the business done in New York were to swell the volume of its interstate business. The office and the work done in New York was part of the "means" by which the plaintiff in error sought to increase, and did increase the interstate trade and traffic in the product of its mines. "The tax upon " it, therefore, was, according to the principles estab- " lished by the decisions of this Court, a tax upon a " means or occupation of carrying on interstate com- " merce, pure and simple."

McCall vs. State of California, 136 U. S., 104.

There is certainly in this tax an interference with and a restriction upon the free introduction of the plaintiff's silver and lead from the Territory of Utah and the State of Illinois into the State of New York, and the free disposal of the same in commerce in the latter State (Brown vs. Houston, 114 U. S., 622).

"If the power (to tax interstate commerce) exists " in the State at all, it has no limit but the discretion of " the State, and might be exercised in such a manner " as to drive away that commerce, or to load it with an " intolerable burden, seriously affecting the business

" and prosperity of other States interested in it; and if " those States, by way of retaliation, or otherwise, " should impose like restrictions, the utmost confusion " would prevail in our commercial affairs."

Phil., etc., Mail S. S. Co. vs. Penn., 122 U. S., 326.

The objects sought to be guarded against by the commerce clause of the U. S. Constitution, are contravened in this instance by what is "unjust discrimination," as has been admitted by the Court of Appeals of the State of New York itself (Record, p. 106, fol. 201). "If from the imperfection of human language " there should be serious doubts respecting the extent " of any given power, it is a well settled rule that the " objects for which it is given, especially when those " objects are expressed in the instrument itself, should " have great influence in the construction" (Gibbons vs. Ogden, 9 Wheat., 188).

3. The views here advanced leave the State of New York free to tax the plaintiff in error in many legitimate ways which do not regulate interstate commerce.

Thus the State of New York might tax the silver in the State of New York, or any other property of the plaintiff therein situated.

Brown vs. Houston, 114, U. S., 622.

POINT V.

IF THE TAXES IN QUESTION ARE NOT LAID UPON THE BUSINESS OF PLAINTIFF IN ERROR IN NEW YORK THEY ARE LAID UPON ALL ITS BUSINESS OR UPON ALL ITS CAPITAL, AND THERFORE EITHER REGULATE COMMERCE AMONG THE STATES OR EFFECT EXTRA TERRITORIAL TAXATION AND ARE INVALID PRO TANTO.

Although the Court of Appeals has said that the taxes in question fall upon the business of the plaintiff in error done within the State of New York, measured by all the capital stock of the company, still this Court will not consider itself bound to accept that view of the effect of the statutes under discussion. The *construction* of a statute by a State Court may be considered binding upon this Court but a determination of its effect cannot be so regarded. The construction of a statute determines what the Legislature *meant* to effect but does not determine what was actually effected. Notwithstanding the views of the Court of Appeals in New York it is an open question in this Court whether or not the *effect* of the statute was what was intended by the Legislature. It follows that if this Court sees that the effect of the statute is an unconstitutional one the statute will be declared invalid and inoperative *pro tanto*.

It is obvious that the entire capital stock of the company taken at a valuation, as was done in computing the tax for 1881, or multiplied as to its par value by the per centum of dividend declared, as was done in computing the tax for 1882, furnishes no basis for a fair estimate of the company's business transacted within the State of New York and gives no rational assessment upon which the rate of taxation prescribed by the statute can be brought to bear.

The measure of the tax, the entire capital stock of the company, bears no logical or just relation to the business of the company done within the State. There is no connection between the two subjects, that upon which the Court of Appeals says the tax falls, and that which is the measure or standard of the tax. Such a connection is necessary to effect the result of taxation of the company's business within the State.

In Provident Institution vs. Mass., 6 Wall., 611, in arguing that the tax in question, a franchise tax measured by the deposits in a savings bank, did not fall

upon United States bonds, the property of the bank, this Court said: "It is quite obvious that there is no necessary relation between the average amount of the deposits and the amount of the property owned by the institution."

In this connection, the case of 105 U. S., 460, Tel. Co. vs. Texas, is very instructive. Texas imposed a tax of one cent on every full-rate message, and one-half cent on every message less than full rate. The tax was sought to be justified under a provision of the Constitution of Texas, by which the Legislature was authorized to "impose occupation taxes, both upon natural persons and corporations, other than municipal, doing business in this State." This Court refused to regard the tax in question as an *occupation* tax, and held that as the tax was in "no respect proportioned to the business," it was a tax on the messages themselves, and was invalid as a regulation of commerce so far as it affected messages sent out of the State.

The conclusion is forced upon us that in such a case as this, where the variations in value of the measure of tax bear no proportional relation to the variations in amount or value of the thing *nominally* taxed, that thing is *really* the subject of the tax, which by its variations in value determines the amount of the tax. We are not now dealing with a domestic corporation, whose franchise to be a corporation may justly be said, and has been said by this Court, in the Home Insurance Company case, to be properly estimated by a valuation of all its capital stock, but with a foreign corporation, whose franchises cannot be taxed by the State of New York. We are not dealing with a license tax, imposed as a condition of entering the State (see Point I.) We are not even dealing with a specific tax, or a fixed and arbitrary sum upon the avocation. We are dealing with a tax that purports to be one on business, and is laid in proportion as the value of the property varies.

A tax on capital stock at its actual value is a general tax on the property of the corporation.

Bank of Commerce vs. N. Y. City, 2 Black, 620.
Bank Tax Case, 2 Wall., 200, 208.
Peo. vs. Commissioners, 23 N. Y., 192–5.
Burke vs. Bodlam, 57 Cal., 594.
Chadwick vs. Crapsey, 35 N. Y., 196, 202.
Bennett vs. Bushwick R. Co., 75 N. Y., 211, 216.
People *ex rel.* Union Trust Co. vs. Coleman, 126 N. Y., 133.

In determining the subject of a tax the effect of the statute is to be looked at, and is to decide the question. The tax must necessarily fall upon that subject, irrespective of any language of construction used in a statute, which is, in fact, made to feel the burden of the tax by the effect of the statute. In determining the constitutionality of a statute its scope and effect are as proper for consideration as its language.

Pleasant Township vs. Ætna Life, 138 U. S., 75.

The amounts of the taxes in question are determined by valuations of the capital stock of plaintiff in error. It would seem, therefore, to be the better view of the statutes in question, that the taxes complained of fall either upon that which in its valuation determines the amount of the tax, or upon that of which it is the measure and standard and to which it bears a natural relation.

As a valuation of the entire capital stock of plaintiff in error is the just and natural measure of either all the business of the company, or of all its property, it follows that the taxes in question fall either upon all its business or upon all its property.

1. If the taxes in question fall upon *all* its business or upon *all* its property, they fall upon and regulate inter state commerce, because *some* of the business of

this company is done outside of the State and *all* the property of the company represents its capacity to do business among the States and in all the States.

Carson vs. Maryland, 120 U. S., 502.

2. In so far as the taxes in question fall upon *all* the business and *all* the property of the plaintiff in error, they effect extra territorial taxation.

The record shows that the plaintiff in error mined and smelted ore in Utah, shipped it to Chicago and there refined its base bullion; that the business done in the State of New York was a very small part of its entire business; that out of its ten millions of dollars of capital stock, it had in the City of New York on the average, during the year 1881, only $106,580.62, and during the year 1882, $379,808.20.

The plaintiff in error is not endeavoring to escape its fair share of the burden of taxation. For ten years it has been trying to pay the State of New York its taxes upon its business transacted within that State, measured by the capital actually employed within the State, or to state the effect of the statute more accurately, upon its property situated within the State of New York. The question now presented in this case is whether New York, and, therefore, every State in the Union, can, under guise of taxing business that has been transacted within its border (not of imposing a license tax), tax all the property of a foreign corporation wheresoever situated. This tax is a property tax, and nothing else, in its operation upon foreign corporations. The recent decisions of this Court establish that proposition beyond question in dealing with the statutes of identical provisions.

Western Union Tel. Co. vs. Mass., 125 U. S., 530.

Pullman Car Co. vs. Penna., 141 U. S., 18.

Massachusetts vs. W. U. Tel. Co., 141 U. S., 40

To the extent then that the taxes in question affect the capital of plaintiff in error situated out of the State of New York and effect extra-territorial taxation they are invalid, while valid in their operation upon property and capital situated within the State of New York.

It is well settled in this Court that no State can tax business or property without her jurisdiction.

Foreign-held Bond case 15 Wall., 300.

This Court held in this case that the power of taxation of a State is limited to persons property and business within her jurisdiction, and that all taxation must relate to one of these subjects. The Court said:

"Property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised."

The State of New York, by amending the statutes in question for the future, and permitting settlements for the past, on the basis of taxing both foreign and domestic corporations only upon their capital employed within the State (Ch. 501, Laws 1885, Appendix p.), although excepting plaintiff in error from the benefit of the act, has recognized the principles here contended for.

The officials of the State of New York in their administration of the statutes in question have recognized the principles here contended for.

In 1881 the Comptroller of the State of New York informed all foreign manufacturing corporations manufacturing without this State, but doing a portion of their business within the State, that they should pay their tax under this statute, based upon the proportionate amount of their capital employed within the State, the amount of business done within the State to be taken into consideration in arriving at the proportionate amount of capital thus employed (Record, p. 81, fol. 138).

In 1882 the Comptroller extended this construction to all foreign corporations (Record, p. 80, fol. 136).

Notwithstanding the issue of circulars by the Comptroller of the State of New York declaring these views to be of general application, plaintiff in error was selected as a test case by the officials of the State of New York for the purpose of taking the views of the Courts upon the construction of the statutes now under discussion.

POINT VII.

THE STATUTES IN QUESTION SHOULD BE CONFINED IN THEIR EFFECT TO THE PROPERTY OF PLAINTIFF WITHIN THE JURISDICTION OF THE STATE OF NEW YORK.

If these statutes be declared effective only to tax the capital of the plaintiff in error within the State of New York, they will be confined in their operation to a subject within the taxing power of this State, and restrained from operating upon subjects beyond the exercise of this power.

Telegraph Co. vs. Texas, 105 U. S., 460.
Western Union Telegraph Co. vs. Atty. Genl., 125 U. S., 530.
Ralleman vs. Western Union Telegraph Co., 127 U. S., 411.
Massachusetts vs. Western Union Telegraph Co., 141 U. S., 40.

POINT VIII.

THE AFFIRMANCE OF THE JUDGMENT AGAINST PLAINTIFF IN ERROR, WOULD BE A DEPRIVATION BY THE STATE OF NEW YORK OF THE PROPERTY OF THE PLAINTIFF IN ERROR

WITHOUT DUE PROCESS OF LAW AND A DENIAL OF THE EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

"Nor shall any State deprive any person of life, "liberty or property without due process of law, nor "deny to any person within its jurisdiction the equal "protection of the law" (Con. U. S. Amendments, Art. XIV., Sec. 1).

In Bell's Gap R. R. Co. vs. Pennsylvania, 134 U. S., 232, is found one of the latest statements of what constitutes the equal protection of the laws.

In that case it was claimed that the tax of three mills upon the face value of moneyed securities denied to the bondholder the equal protection of the laws, since all other personal property in the State was taxed at its actual value.

This Court said:

"The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation *in all proper and reasonable ways.* It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as *they proceed within reasonable limits and general usage*, are within the discretion of the State Legislature of the people of the State in framing their Constitution."

The Court refers to the language of Mr. Justice FIELD

in Barbier vs. Connolly, 113 U. S., 27, who says that the Fourteenth Amendment "*undoubtedly intended not* "*only that there should be no arbitrary deprivation of* "*life or liberty, or arbitrary spoliation of property* "* * * that all persons should be equally entitled "to pursue their happiness and acquire and enjoy "property * * * that no impediment should be "interposed to the pursuits of any one, except as ap- "plied to the same pursuits by others under like cir- "cumstances; that no greater burdens should be laid "upon one than are laid upon others in the same call- "ing and condition."

See also Missouri Pacific Railway Co. vs. Mackey, 127 U. S., 209.

In New Jersey, the highest Court has recently held that "the power of the Legislature to impose taxes on "persons, property, business and franchises, is un- "limited, save only by such restrictions upon the exer- "cise of that power as are found in the organic law, "or such *as are inherent in the nature of the subject.*"

Standard Cable Co. vs. Attorney-General, 46 N. J. Eq., 273.

As to equal protection, the test is: are all similar foreign corporations by these statutes treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed.

Hing vs. Crowley, 113 U. S., 703: "The discrimina- "tions which are open to objection are those where "persons engaged in the same business are subjected "to different restrictions or are held entitled to differ- "ent privileges under the same conditions. It is only "then that the discrimination can be said to impair "that equal right which all can claim in the enforce- "ment of the laws."

In his dissenting opinion in Davidson vs. New Orleans, 96 U. S., 107, BRADLEY, J. says :

"I think, therefore, we are entitled under the Fourteenth Amendment not only to see that there is some process of law, but due "process of law," provided by the State law when a citizen is deprived of his property ; and that in judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, in the power of assessment for local improvements or none of these, and if found to be suitable or admissible in this special case, it will be adjudged to be "due process of law ;" *but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law.*"

In Caldwell vs. Texas, 137 U. S., 691, this Court says: "And due process of law is so secured by laws "operating on all alike, and not subjecting the indi- "vidual to the arbitrary exercise of the powers of gov- "ernment, unrestrained by the established principles of "private right and distributive justice. * * * The "power of the State must be exerted within the limits "of those principles, and its exertion cannot be sus- "tained when *special, partial and arbitrary.*"

See also

Leeper vs. Texas, 139 U. S., 462.
Lent vs. Tillson, 140 U. S., 327.

See also

The Western Union Cases, 141 U. S., 26, 45, 67.

THE COURTS OF NEW YORK CONCEDE THE PRINCIPLES CONTENDED FOR, BUT DENY THEIR APPLICATION TO THE TAX IN QUESTION.

In the Equitable case (96 N. Y., 396) the Court said : "The Legislature may exercise it upon all objects "within its jurisdiction which it concludes should bear

"a portion of the public burdens. * * * While the "taxing power is thus supreme, yet it may be so exer- "cised as to transcend constitutional restraints, and to "invade rights protected by constitutional guarantees. "If, *under the guise of taxation the Legislature should* "*attempt to make exactions purely arbitrary, founded* "*upon no rule of equity or justice, its act might be con-* "*demned as depriving the owner of his property without* "*due process of law and without just compensation*" (Gordon vs. Carnes, 47 N. Y., 608; Stuart vs. Palmer, 74 *Id.*, 183; People *ex rel.* D. & H. R. R. Co. vs. Salem, 20 Mich., 452).

See also to the same effect

People *ex rel.* M. F. Ins. Co. vs. Comr., 76 N. Y., 71.

In Gordon vs. Carnes, 47 N. Y., 608, referred to by the Court, RAPALLO, J., says that in New York, "to raise "the constitutional question would require an extreme "case, *where no apportionment of the tax with reference* "*benefit should be attempted*, and no discretion on the "subject exercised:

"Everything that may be done under the name of "taxation is not necessarily a tax, and it may happen "that an oppressive burden imposed by the govern- "ment, when it comes to be carefully scrutinized, will "prove, instead of a tax, to be an unlawful confiscation "of property, unwarranted by any principle of con- "stitutional government."

Cooley's Constitutional Limitations, 5 Ed., p. 603.
Cooley on Taxation, 4 Ed., p. 60.
Burroughs on Taxation, Sec. 26.
Loan Association vs. Topeka, 20 Wall, 655.

"It is of the very essence of taxation that it be "levied with equality and uniformity, and to this end, "that there should be some system of apportion- "ment."

Cooleys' Constitutional Limitations, p. 612.

UNDER THE GUISE OF TAXATION, NEW YORK HAS ATTEMPTED TO MAKE AN EXACTION PURELY ARBITRARY, FOUNDED UPON NO RULE OF EQUITY, OR JUSTICE, OR ECONOMIC PRINCIPLE, OF AN UNUSUAL CHARACTER UNKNOWN TO THE PRACTICE OF OUR GOVERNMENT, AND IN EFFECT AN ARBITRARY SPOLIATION OF PROPERTY.

This question and its solution lie within a very narrow compass.

The Court of Appeals of the State of New York, in the case of the Equitable Trust Company, held that such company being a foreign corporation could not be taxed by the State of New York in reference to its property situated outside of New York, and *its business not done there,* and that it could not be taxed on account of its corporate franchise, as that was not given by New York laws, was dependent upon the laws of Connecticut, and had no existence separate therefrom (People vs. Equitable Trust Co., 96 N. Y., 393).

The Court of Appeals then held as follows:

"*We are of opinion that this was a tax upon the "business of this corporation done within this State.*" Assume, then, that this is a tax upon the business of the Horn Silver Mining Company *done within the State of New York.*

The amount of this tax is determined by a fixed percentage, either *upon the actual value in cash of the capital stock of the company not less, however, than the the average price which said stock sold for during said year;* or if the dividends made or declared during the preceding year have amounted to six per cent. or more upon the par value of its capital stock, then the tax is a fixed percentage *upon the par value of its capital stock for each one per centum of dividends so made or declared* (L. 1880, Ch. 542, as amended by L. 1881, Ch. 361, Secs. 1, 3).

The Courts of New York have discussed what this actual value consists of in the case of the local taxation

of the capital stock of domestic corporations. That law declares that the capital stock of domestic corporations shall be taxed locally at its "actual value."

In People, *ex rel.*, Knickerbocker Fire Co. vs. Coleman, 107 N. Y., 543, the Court says: "The law does "not prescribe how the actual value of the capital "stock of a corporation is to be ascertained. That is "left to the judgment of the assessors, and in appraising the actual value they have a right to resort to all the tests and measures of value which "were ordinarily adopted for business purposes in estimating and measuring values "of property. They may take into account the business of the corporation, its property, the value "of its actual assets, the amount and nature of its "present and contingent liabilities, the amount of its "dividends and the market value of its shares of stock "in the hands of individuals. * * * One mode of "arriving at the actual value of the capital stock of a "corporation is to take what is sometimes called the "book value, which is reached by estimating all the "assets as they appear upon the corporate books, and "deducting all the liability and the matters required to "be deducted by law and taking the balance as the "measure of value for assessment."

See also People *ex rel.*, Union Trust Co., vs. Coleman, 126 N. Y., 433.

We have, therefore, a tax upon *business done within New York State*, and its amount graduated by elements which do not vary in any way according to the extent of that business, or confined in any way to property or business within the jurisdiction of the State.

Take the case at bar:

In 1881 the business and manufacturing done within the State of New York was insignificant compared with the business and manufacturing done in Utah and Illinois. The property or assets within such State was

also insignificant compared with the property and assets in Utah and Illinois. Yet the tax on *the* business done in New York was determined by the ten millions of assets, the bulk of which were out of the jurisdiction.

In 1882 a like state of facts existed, yet dividends out of profits earned through property and business out of the jurisdiction determined the amount of the tax.

Such method of taxation cannot be defended by any principle which is in harmony with the taxing power.

In Pennsylvania the Courts have held that the dividends furnish a fair measure of the value of the capital stock.

See

Bridge Co. vs. Com., 117 Pa. St., 265.
Fidelity Co. vs. Loughlin, 139 Pa. St., 620.
Rothermel vs. Meyerle, 136 Pa. St., 265.

The Pennsylvania courts have been compelled to find in their act a relation between the tax and its measure, which is fair and reasonable, and this is true of all systems which the courts have supported.

In the State R. R. Tax Cases, 92 Wallace, 575, this Court examined the method to see if it be just to the owners, equal and fair in its relation to taxes on other property, and if it enforces a just contribution that such property should pay for the benefits it received at the hands of the Government.

In the case of Com. vs. Provident Institution for Savings, 12 Allen, 312, the tax was upon the franchise measured by a certain percentage on the average amount of its deposits.

The Court said: "It certainly cannot be contended that the franchise granted to and exercised by a savings bank is not a proper subject for an excise or duty. How is it to be graduated or measured? *It would not be reasonable to impose it arbitrarily, irrespective of the benefit or advantage* which the exercise of corporate

privileges conferred upon the body on which the excise was laid.

"Some method must be resorted to in order to ascertain a fair and just basis on which to calculate the amount of the tax, so that *there may be some proportion between the benefits received and the sum paid for their enjoyment* * * * In the statute under consideration the Legislature have adopted as a rule by which to ascertain the amount of the tax which each bank is to pay at stated periods, the extent of its business during the six months preceding. This is certainly a reasonable standard, because it graduates the amount of the excise on each franchise according to the capacity of the corporation for business and the value of the privilege which it exercises under its charter."

In Machine Co. vs. Gage, 100 U. S., 679, the Court in upholding the tax said: "The exaction is not an "unusal or unreasonable one."

In Hinson vs. Lott, 8 Wall., 148, the Court held that legislation which involved a principle which might lead to actual commercial non-intercourse was forbidden by the commercial clause of the Constitution.

The foreign corporation itself, or its franchises, cannot be protected by the State of New York. Only its property here, or its business done here, can be protected.

Fundamental objections to this tax, based on the doctrines of this Court, may be summarized as follows:

(1) *The amount of the tax on business done within the State is graduated, and yet not with the slightest reference to the proportion of protection received from the State of New York, nor is there any relation between the tax and its measure. The system is arbitrary, founded upon no principle of justice or equity or any economic principle, and is, in effect, an arbitrary spoliation of property.*

(2) *By this system the State of New York attempts to do by indirection what it cannot do directly, that is, tax property and business outside the State of New York.*

(3) *The system is of an unusual character unknown to the practice of our Government.*

(4) *The Court of Appeals in their opinion in the Equitable Trust Company case did not state the true nature of this tax.*

I.

The relation between taxation and protection is well stated in the recent case of

Gibson Co. vs. Pullman South. Car Co., 42 F. R., 572.

" It may be well enough, however, to remark in this " connection that we start out, always, with the founda- " tion principle that every State, exercising the sover- " eign power of taxation, may tax all articles of prop- " erty found within its borders and all business carried " on there whether owned or due by its own citizens or " foreigners. *The protection given while within the " State is the consideration received for the contribution " by taxation to the exchequer of the power that pro- " tects.* * * *

In the case of the State tax on foreign held bonds, 15 Wall, 300, this Court said: " The property mort- " gaged belonged entirely to the company, and so far " as it was situated in Pennsylvania, was taxable there. " If taxation is the corelative of protection, the taxes " which it there paid were the corelative for the protec- " tion which it there received. And neither the taxa- " tion of the property, nor its protection, was aug- " mented or diminished by the fact that the corpora- " tion was in debt or free from debt."

See also Mobile City vs. Kimball, 102 U. S., 691.

In Tappan vs. Merchants' National Bank, 19 Wall, 490, in speaking of a provision of the Constitution of the State of Illinois, "Governments are organized for "the protection of persons and property, and the ex- "penses of the protection *may very properly be appor- "tioned among the persons protected according to the "value of their property protected*," and "The object "should be to place the burden so that it will bear as "nearly as possible equally upon all."

The principles enunciated by this Court in Western Union Tel. Co. vs. Mass., 125 U. S., 530, and referred to above are opposed to the tax at bar. In that case the tax though nominally upon the shares of the capital stock of a foreign corporation was held in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country was made the basis for ascertaining the value of that property. The late Mr. Justice MILLER in commenting on the system said, "nevertheless the com- "pany receiving the benefit of the laws of the State "for the protection of its property and its rights *is li- "able to be taxed upon its real or personal property as "any other person would be.* * * * *the* company was "under an obligation to pay *its fair proportion* of the "taxes necessary to its support."

And again: "Since, therefore, this Statute of Massa- "chusetts is intended to govern the taxation of all cor- "porations therein, and doing business within its terri- "tory, whether organized under its own laws or those "of some other State, *and since the principle is one "which we cannot pronounce to be an unfair or an un- "just one, we do not feel called upon to hold the tax "void*, because we might have adopted a different sys- "tem had we been called upon to accomplish the same "result." And he refers to Western Union Tel. Co. vs. Texas, 105 U. S., 460, where the Court says of the

Telegraph Company: "Its property in the State is "subject to taxation the same as other property, and "it may undoubtedly *be taxed in a proper way on* "*account of its occupation and business.*"

In the case of Lee Sing, 43 F. R., 359, an ordinance of the City of San Franciso came in question which required Chinese to live in a certain locality, and the Court said, "this, besides being discriminating against "the Chinese, and unequal in its operation as between "them and all others, is simply an arbitrary confisca- "tion of their homes and property, a depriving them "of it, without due process, or any process of law."

In Matter of Converse, 137 N. Y., 634, FULLER, Chief-Justice, says: "We repeat, as has been so often said "before, that the Fourteenth Amendment undoubtedly "forbids any *arbitrary deprivation* of life, liberty or "*property.*" * * *

II.

The State of New York cannot do by indirection what it cannot do directly, that is, tax property or business outside the State.

In Guy vs. Baltimore, 100 U. S., 434, the Court held that the City of Baltimore could not "employ the prop- "erty it thus holds for public use so as to hinder, "obstruct or burden interstate commerce in the "interest of commerce wholly internal to that State. "The fees which it exacts to that end, although "denominated wharfage dues, cannot be regarded in "the sense of our former decisions, as compensation "merely for the use of the city's property, but as a "mere expedient or device to accomplish by indirec- "tion, what the State could not accomplish by a direct "tax, viz., build up its domestic commerce by means "of unequal and oppressive burdens upon the industry "and business of other States." The "power of taxa- "tion, however vast in its character and reaching in its

"extent, is necessarily limited to subjects within the "jurisdiction of the State. These subjects are persons, "property and business."

State Tax on Foreign-held Bonds, 15 Wall., 300.

"It has repeatedly been held that the constitution- "ality or unconstitutionality of a State tax is to be de- "termined, not by the form or agency through which it "is to be collected, *but by the subject upon which the* "*burden is laid.* * * * In all these cases it ap- "peared that the bank was required by the statute to "pay the tax, but the decisions turned upon the ques- "tions what was the subject of the tax. *Upon what* "*did the burden really rest*, not upon the question from "whom the State exacted payment into its Treasury."

State Freight Tax, 15 Wall., 232.

As has been said, jurisdiction is as necessary to valid legislative as to valid judicial action.

This Court in the case of Cleveland, Painesville R. R. Co. vs. Pennsylvania, 15 Wall. 300, in speaking of a tax upon foreign-held bonds said, "it is only one of "the many cases where, under the name of taxation, "an oppressive exaction is made without constitutional "warrant, amounting to little less than an arbitrary "seizure of private property. It is, in fact, a forced "contribution levied upon property held in other "states, where it is subjected, or may be subjected to "taxation upon an estimate of its full value."

The Court of Appeals in the Equitable case conceded that if the true construction of the act was that the tax was imposed upon all the business of the foreign corporations it could not be sustained (96 N. Y., 393).

So it will be conceded that if the tax was upon *all* the property of the corporation, including that outside the State of New York, it could not be sustained.

"In such a case the State affords no protection and

" there is nothing for which taxation can be an equiv-
" alent " (Cooley, p. 55, 2d Ed.).

Yet if this were an *ad valorem* tax upon the property of the corporation, its capital stock at its actual value in cash, the burden would lie just where it does now, namely, on property and business outside the jurisdiction. The mere fiat of the Court of Appeals of the State of New York cannot alter the real character of the burden, nor the calling it a tax on *business done within the State* do away with the fundamental difficulty that the tax is not borne by property or business within the jurisdiction.

As Justice BRADLEY in Robbins vs. Taxing District, 120 U. S., 489, says :

" The mere calling the business of a drummer a " privilege cannot make it so."

The territorial limitations of the taxing power are theoretically at least based on taxation and protection being reciprocal.

The amount of the tax at bar is determined by the value of the real and personal estate in Utah and Illinois, and the profits of business done in Utah and Illinois, and is not dependent upon, nor does it vary in any way by the relative amount of real and personal estate and business protected respectively in Utah, Illinois and New York, and yet it is claimed to be a tax solely on business done in the latter State.

The plaintiff in error introduced evidence of the amount of capital employed within the State by showing, among other things, its bank balances. This method is sustained in New York Peo. *ex rel.* Dredging Co. vs. Wemple, 38 State Reporter, 17.

In all cases which have come before this Court where the taxation of foreign corporations was in question, the tax, unless a mere license fee as a prerequisite condition, has always been based upon the proportionate

part of the property or business within the State. In addition to the cases cited,

See Union Pac. R. R. Co. vs. Peniston, 18 Wall., 5.

III.

The system of taxation, as these acts are construed by the Court of Appeals, is unknown elsewhere in the United States.

There is not now, and there has never been in any other State of the Union, a tax upon foreign corporations measured by a valuation of all the capital of the company wherever employed.

The taxes have either been fixed sums, or taxes measured by or varying with the property, business, or receipts within the taxing State.

The inquiry therefore arises what was the origin of this system?

The law was copied from the Pennsylvania statute (L. 1879, p. 113). That statute contained no express limitation of the measure of the tax to the capital employed within the State.

But the Pennsylvania Courts had construed their statutes to fix as the basis of the tax only the capital employed in that State, and it is common learning that under such circumstances the New York Legislature must have adopted with the statute the judicial construction already given to it in the State of its origin.

Skouten vs. Wood, 59 Mo., 380.
Skrainka vs. Allen, 76 Mo., 369.
Comm. vs. Hartnett, 69 Mass., 451.

The leading case in Pennsylvania construing its act is the Standard Oil case, in the 101 Pennsylvania State Reports, 147.

But the New York Courts construed their statute differently, and thereby burdened their own State with a novel and wholly indefensible scheme of taxation, resting

upon no basis except judicial legislation. In 1881, by Chapter 361, the New York Legislature attempted to support such judicial legislation by the addition of the words, "As a tax on its corporate franchise or business," and then in 1885 abandoned the arbitrary measure of *all* capital, and limited it to that within the State.

In the light of these facts the actual effect of these acts should be considered by this Court, and not merely the construction which the State Court has put upon it. As shown above, in determining the constitutionality of a statute, its scope and effect are as proper for consideration as its language (Pleasant Township vs. Ætna Co., 138 U. S., 75).

In 1884 the State of New Jersey inaugurated its system of State taxation of corporations, following Pennsylvania and New York. But, in the case of foreign corporations, the tax was not measured by capital employed everywhere, but by interstate receipts, speaking generally.

This Court, therefore, is urged not to sanction a system of taxing foreign corporations which was not the result of well considered, intentional legislation, but which had its origin in the courts and which was promptly abandoned by the State, and which never existed in this country before, and has not been imitated elsewhere since.

IV.

The Court of Appeals in the Equitable Trust Com-
" pany case state that this tax upon the business of foreign
" corporations done in this State is a specific tax, and
" hence no apportionment or appraisal was required."

But this tax does not come within the examples of specific taxes stated by the Court. The Court misinterpreted the nature of the tax, since it is essentially an *ad valorem* tax, because its amount depends upon the

valuation of property. The tax is *not* the same in the case of all foreign corporations. It varies, and the claim is that it varies so that the burden falls unequally and in violation of the fundamental principles of taxation.

CONCLUSION.

The Horn Silver Mining Company is a "person" within the meaning of the second clause of the Fourteenth Amendment.

Missouri Pacific Railway Company vs. Mackey, 127 U. S., 209.
Pembina Consolidated Silver Co. vs. Pennsylvania, 125 U. S,. 181.

The Horn Silver Mining Company was a person within the jurisdiction of the State of New York, with reference to the subject of controversy and within the meaning of the amendment.

A *foreign* corporation *may* be a person *within* the jurisdiction of the State of New York.

Thus in Pacific Express Co. vs. Seibert, 44 Fed. Rep., 310 (Oct., 1890), the plaintiff was a *Nebraska* corporation complaining that the State of *Missouri* denied to it the equal protection of the laws by certain *taxation*, and the Court assumed the applicability of the amendment, and inquired whether such equal protection was denied.

So in Pembina Mining Co. vs. Pennsylvania, 125 U. S., 189, this Court, by Mr. Justice FIELD, said of a *Colorado* corporation, that "*on condition* it pays the "required license tax it can claim the same protection "in the use of the office than any other corporation "having a similar office may claim."

So in Fire Association of Philadelphia vs. New York, 119 U. S., 110, Mr. Justice BLATCHFORD said of a *Pennsylvania* corporatiou: "By going into the State of New "York in 1872 it assented to such prerequisite as a

" condition *of its admission within the jurisdiction of* " *New York. It could not be of right within such juris-* " *diction* until it should receive the consent of the State " to its entrance therein under the new provisions, " and such consent could not be given until the tax as " a license fee for the future should be paid."

The State of New York, by the statutes complained of, denied to the Horn Silver Mining Company the equal protection of its law.

According to the decisions of this Court the Fourteenth Amendment controls the action of the State of New York in the following respects, among others:

A. *All persons shall be equally entitled to acquire and enjoy property.*

B. *No impediment shall be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances.*

C. *No greater burdens can be laid upon one than are laid upon others in the same calling and condition.*

The cases supporting the above doctrines are cited above.

All similar foreign corporations are not by these statutes of 1880 and 1881 treated alike under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed.

Two foreign corporations within the jurisdiction of New York might, under these statutes, be subject to the same burden, and yet not be at all in the same or similar circumstances and conditions as to business done within the State upon which alone, as the Court of Appeals holds, the taxes are imposed. One might have little property here and do only a small part of its main and corporate business in the State, while the other might do almost all its business here, and have almost all its property here. Yet if actual value of their entire capital stock or its par value multiplied by the rate of the *dividends* made or declared thereon were the same, the burden of taxation would be the same.

A greater burden is thus laid upon one foreign corporation than another, and an impediment is interposed to the pursuit of the business of one foreign corporation which is not applied to another.

The unequal operation of these laws is a necessary result from the character of the method itself. It is shown above that the tax on business *within* this State was measured by a standard which the Court of Appeals itself acknowledges does not measure necessarily or generally the volume or value of its business done in this State (Equitable Case, 96 N. Y., 397).

This being so the business of one foreign corporation done in New York State, is subjected to a tax or burden, which is different from that laid upon the business of another. The actual burden might, by mere accident, be the same as where the actual value of the capital stock or the par value and the dividends made or declared were the same, although at the same time the business done might be far different.

But where a tax is laid upon property or business and yet its amount is measured by elements which do not vary as the property or business taxed vary, there must necessarily result the gravest inequality. If in a particular case the amount of the tax bears no relation to the property or business taxed, of course, as between different properties or businesses, there can be no relative equality.

Point IX.

IT IS URGED THAT THE JUDGMENT SHOULD BE REVERSED AND THE COMPLAINT DISMISSED, OR THAT THE CAUSE BE REMITTED TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR FURTHER PROCEEDINGS.

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APPENDIX OF STATUTES OF THE STATE OF NEW YORK.

CHAPTER 542.

AN ACT TO PROVIDE FOR RAISING TAXES FOR THE USE OF THE STATE UPON CERTAIN CORPORATIONS, JOINT-STOCK COMPANIES AND ASSOCIATIONS.

Passed June 1, 1880, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Hereafter it shall be the duty of the president or treasurer of every association, corporation or joint-stock company *liable to be taxed on its capital stock, as provided in Section 3 of this Act,* to make report in writing to the Comptroller annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said

common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November, in each year, in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock, amounted to less than six per centum upon the par value of said common or preferred stock, *estimate and appraise the capital stock of such company* upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, *at its actual value in cash*, not less, however, than the average price which said stock sold for during the year; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the Comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation by them signed, and attested by the magistrate or other person qualified to administer the same; provided, that if the Comptroller is not satisfied with *the valuation so made and returned, he is hereby authorized and empowered to make a valuation thereof*, and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the estate thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled may within ten days, appeal therefrom to the Board of Equalization, which board, on such appeal, shall affirm or correct the account so settled by the Comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account as settled by the Comptroller be deposited with the State Treasurer.

SEC. 2. If the said officers of any such corporation, joint stock company or association shall neglect or refuse to furnish the Comptroller, on or before the fifteenth day of November of each and every year, with the report aforesaid, or the certificate of appraisement, and oath or affirmation, as the case may be, as required by the first section of this act, it shall be the duty of the Comptroller of the State to add ten per centum to the tax of said corporation for each and every year for which such report or certificate of appraisement and oath or affirmation were not so furnished, which percentage shall be assessed and collected with the said tax in the usual manner of assessing and collecting such taxes; provided, that if said officers of any such corporation, joint-stock company or association shall intentionally fail to comply with the provisions of the first section of this act for two successive years, the Comptroller shall report the fact to the Governor, who, if he shall be made satisfied that such failure was intentional, shall thereupon direct the Attorney-General to take proceedings, in the name of the people of this State, to declare the charter of said corporation, joint-stock company or association forfeited, and its chartered privileges at an end, and for such intentional failure the charter, chartered privileges, corporate rights and franchises of every such corporation, joint-stock company or association shall cease, end and be determined.

SEC. 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated under any law of this State, *or now or hereafter incorporated by any other State or country, and doing business in this State*, except savings banks and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State, shall be subject to and pay a tax into the Treasury of the State annually, to be computed as follows: If the

dividend or dividends made or declared by such corporation, joint stock company or association, during any year ending with the first Monday in November, amount to six or more than six per centum upon the par value of its capital stock, *then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividend so made or declared*, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, *then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act;* and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof; then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of the first section of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum.

SEC. 4. It shall be the duty of the treasurer or other officer having charge of any corporation, joint stock company or association, upon which a tax is imposed

by either of the preceding sections of this act, to transmit the amount of said tax to the treasury of the State within fifteen days from the first day of January in each and every year.

SEC. 5. Hereafter it shall be the duty of the president, secretary or other proper officer of each and every insurance company or association incorporated by or under any law of this State, except life insurance companies, and purely mutual beneficial associations, whose fund for the benefit of members, their families, or heirs, is made up entirely of contributions of their members, and the accumulated interest thereon, to make report in writing to the comptroller semi-annually upon the first days of August and February in each year, setting forth the entire amount of premiums received on business done in this State by such company or association during the six months ending the preceding first days of July and January, whether the said premiums were received in money or in the form of notes, credits, or any other substitute for money, and every such corporation or association shall pay into the State treasury at the dates aforesaid a tax of eight-tenths of one per centum upon the gross amount of said premium; provided, that said report shall be made under oath or affirmation, and that it shall be the duty of the Comptroller of the State to add ten per centum to the account of any company or association whose officers shall neglect or refuse for a period of thirty days to make the said report, or to pay into the State Treasury the tax imposed by this section. Every fire or marine insurance company organized under the laws of any other State or country, and doing business in this State, and every person, partnership, corporation or company doing a fire or marine insurance business in this State, shall pay into the Treasury on the first day of February and August in each year, a tax of eight-tenths of one per centum on their gross premiums received by them on

business transacted in this State during the six months preceding the first day of January and July. And every such company, person, partnership, or corporation, or the agents and officers thereof in this State shall make report in writing to the comptroller semi-annually upon the first day of February and August in each year, setting forth the entire amount of premiums received.

SEC. 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated by or under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other State, and doing business in this State, and every express company, palace car or sleeping car company, incorporated or unincorporated, doing business in this State, shall pay to the State Treasurer, for the use of the State, a tax of five-tenths of one per centum upon the gross earnings in this State of said corporation or company for tolls, transportation, telegraph or express business transacted in this State, and in arriving at the gross earnings of any express, palace car or sleeping car company, or freight line, there shall be first deducted the expenses paid to any common carrier for transportation upon such business within this State.

Nothing in this section contained shall be held to apply to any street surface railroad company.

SEC. 7. The tax imposed under Section 6 of this act shall be paid semi-annually, upon the first days of February and August of each year, the first payment to be made on the 1st day of August, A. D. eighteen hundred any eighty, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of the corporations, joint-stock companies or associations therein referred to, to transmit to the Comptroller a statement under oath or affirmation, of the amount of the gross receipts of the said associations, corporations or joint-stock companies derived from all sources during the preceding six months, and if any such corporation, joint stock company or association shall neglect or refuse, for a period of thirty days after such tax becomes due, to make returns or to pay the same, the amount thereof, with the addition of ten per centum thereto, shall be collected for the use of the State as other taxes are recoverable by law, from such corporation, joint-stock company or association.

SEC. 8. The lands and real estate of the various corporations, joint stock companies and associations mentioned in this act shall continue to be assessed and taxed where situated, but the capital stock and personal property of said corporations, joint-stock companies and associations shall hereafter be exempt from assessment or taxation, except as in this act prescribed, and no tax or gross receipts, except as in this statute authorized, shall be imposed or charged against any street horse railroad company.

SEC. 9. The taxes imposed by this act, and the revenue derived thereform shall be applicable to the payment of the ordinary and current expenses of the State, and if any corporation, joint-stock company or association shall neglect or refuse to pay any tax by this act required to be paid, the same may be used for in the

name of the people of the State, and recovered in any court of competent jurisdiction, in an action to be brought by the Attorney-General at the instance of the Comptroller.

SEC. 10. This act shall take effect immediately.

CHAP. 361.

AN ACT TO AMEND CHAPTER FIVE HUNDRED AND FORTY-TWO OF THE LAWS OF EIGHTEEN HUNDRED AND EIGHTY, ENTITLED "AN ACT TO PROVIDE FOR RAISING TAXES FOR THE USE OF THE STATE UPON CERTAIN CORPORATIONS, JOINT-STOCK COMPANIES AND ASSOCIATIONS."

Passed May, 26, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled "An Act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations," is hereby amended so as to read as follows:

SEC. 1. Hereafter, it shall be the duty of the president or treasurer of every association, corporation or joint-stock company *liable to be taxed on its corporate franchise or business, as provided in section three of this act*, to make report in writing to the Comptroller, annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases

where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November in each year in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, *estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash*, not less, however, than the average price which said stock sold for during said year; *and when the same shall have been so truly estimated and appraised*, they shall forthwith forward to the Comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same; provided, *that if the Comptroller is not satisfied with the valuation so made and returned*, he is hereby authorized and empowered to make a valuation thereof, and to settle an account upon the valuation so made by him for the taxes, penalties and interest due to the State thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled may within ten days appeal therefrom to a Board consisting of the Secretary of

State, Attorney-General and State Treasurer, which Board, on such appeal, shall affirm or correct the account so settled by the Comptroller, and the decision of said Board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the Comptroller, be deposited with the State Treasurer.

SEC. 2. If the said officers of any such corporation, joint stock company or association shall neglect or refuse to furnish the Comptroller, on or before the fifteenth day of November of each and every year, with the report aforesaid, or the certificate of appraisement and oath or affirmation, as the case may be, as required by the first section of this act, or to pay the tax imposed on such corporation, company or association within fifteen days after the first of January, as provided in the fourth section of this act, it shall be the duty of the Comptroller of the State to add ten per centum to the tax of said corporation, company or association for each and every year for which such report or certificate of appraisement and oath or affirmation were not so furnished, or for which such tax shall not have been paid, which percentage shall be assessed and collected with the said tax in the usual manner of assessing and collecting such taxes, provided, that if said officers of any such corporation, joint stock company or association shall intentionally fail to comply with the provisions of the first or fourth section of this act for one year, the Comptroller shall report the fact to the Governor, who, if he shall be made satisfied that such failure was intentional, shall thereupon direct the Attorney-General to take proceedings, in the name of the people of this State, to declare the charter or privileges of said corporation, joint stock company or association forfeited, and at an end; and for such intentional failure duly found, the charter and privi-

leges of every such corporation, company or association shall cease, end, and be determined.

SEC. 3. Every corporation, joint-stock company or association whatever, *now or hereafter incorporated or oaganized under any law of this State, or now or hereafter incorporated or organized by or under the laws of any other State or country and doing business in this State,* except savings banks and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State, which exception shall not be taken to include gas companies or trust companies, *shall be subject to and pay a tax, as a tax upon its corporate franchise or business,* into the treasury of the State annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint stock company or association, during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, *then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made or declared;* or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, *then the tax to be at the rate of one and one-half mill upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act;* and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the

rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto tax shall be charged at the rate of one and one-half mill upon each dollar of a valuation, made also in accordance with the provisions of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made and declared did not amount to six per centum.

SEC. 4. It shall be the duty of the treasurer or other officer having charge of any corporation, joint-stock company or association, upon which a tax is imposed by either of the preceding sections of this act, to transmit the amount of said tax to the treasury of the State within fifteen days after the first day of January in each and every year.

SEC. 5. Hereafter it shall be the duty of the president, secretary, or other proper officer of every insurance company, and every association *organized or incorporated by or under any law of this State*, and of every person or partnership doing an insurance business in this State, except life insurance companies, and purely mutually beneficial associations, whose fund for the benefit of members, their families ar heirs, is made up entirely of contributions of their members, and the accumulated interest thereon, to make report in writing to the Comptroller annually upon the first day of August in each year, after the first day of August, eighteen hundred and eighty-one, setting forth the entire amount of premiums received on business done in this State by such company or association, person or partnership, during the year ending with the preceding thirteenth day of June, whether the said premiums were in money or in the form of notes, credits, or any other substitute for money, and every such company, association, person or partnership, shall pay

into the State treasury at the date *aforesaid, a tax, as a tax on its corporate franchise or business, at the rate of eight-tenths of one per centum upon the gross amount of said premiums.* And every company or association *organized under the laws of any other State* or country, and every person or partnership doing an insurance business in this State, except as aforesaid, shall pay into the treasury on the first pay of August in each year a tax at the rate of eight-tenths of one per centum on the gross premiums *received by them on business transacted in this State* during the year ending with the preceding thirtieth day of June, whether the said premiums were in money or in the form of notes, credits, or any other substitute for money. And every such company, association, person, partnership, or the agents and officers thereof in this State, shall make report in writing to the Comptroller annually upon the first day of August in each year, setting forth the entire amount of premiums received during the period aforesaid. Provided, that the reports above required shall be made under oath or affirmation, and that it shall be the duty of the Comptroller of the State to add ten per centum to the account of any company, association, person or partnership, which shall neglect or refuse for a period of thirty days to make the said report, or to pay into the State Treasury the tax imposed by this section. And it shall also be the duty of the President, Secretary, or other proper officer of each and every insurance company, association, partnership, and of every person liable to be taxed under this section, to make a report in writing to the Comptroller on the first day of August, eighteen hundred and eighty-one, under oath or affirmation. of the entire amount of premiums received on business done in this State during the six months ending with the preceding thirtieth day of June, and to pay a tax at the rate of eight-tenths of one per centum thereon. And it shall be the duty of the Comptroller of the State

to add ten per centum to the account of any company, association, person or partnership which shall neglect or refuse for a period of thirty days to make the said report, or to pay into the State treasury the tax imposed.

SEC. 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated or organized by or under any law of this State, and doing business in this State, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other State, and doing business in this State, and every express company or association, palace car or sleeping car company or association incorporated or unincorporated, doing business in this State, shall pay to the State Treasurer for the use of the State, as a tax upon its corporate franchise or business in this State, a tax, at the rate of five-tenths of one per centum upon the gross earnings in this State of said corporation or company or association, for tolls, transportation, telegraph, telephone or express business transacted in this State.

The tax imposed under section six of this act shall, after the first day of August, eighteen hundred and eighty-one, be paid annually on the first day of August of each year. It shall be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred to in section six of this act to transmit to the Comptroller, on

the first day of August in each year, a statement under oath or affirmation of the amount of the gross earnings of the said associations, corporations or joint-stock companies derived from all sources during the year ending with the preceding thirtieth day of June, together with the amount of tax imposed thereon by section six. And it shall also be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred to in section six of this act, to transmit to the Comptroller on the first day of August, eighteen hundred and eighty-one, a statement under oath or affirmation of the amount of the gross earnings of the said associations, corporations or joint-stock companies derived from all sources during the six months ending with the thirtieth day of June, eighteen hundred and eighty-one, together with the tax imposed thereon by section six of this act. And if any such corporations, joint-stock company or association shall neglect or refuse for a period of thirty days after any tax imposed by sections six or seven of this act becomes due, to make returns or to pay the same, the amount thereof, with the addition of ten per centum thereto, shall be collected for the State as other taxes are recoverable by law from such corporation, joint stock company or association.

SEC. 8. The corporations, joint-stock companies and associations mentioned in this act as taxable, shall hereafter be exempt from assessment and taxation for State purposes, except upon their real estate and as herein provided; but they shall in all other respects be liable to assessment and taxation as heretofore.

SEC. 9. The taxes imposed by this act, and the revenue derived therefrom, shall be applicable to the payment of the ordinary and current expenses of the State, and if any corporation, joint-stock company, person, partnership or association shall neglect or refuse to pay any tax by this act required to be paid, the same may

be sued for in the name of the people of the State, and recovered in any court of competent jurisdiction, in an action to be brought by the Attorney-General at the instance of the Comptroller.

SEC. 10. All obligations, liabilities and taxes heretofore incurred or imposed under said act, Chapter five hundred and forty-two of Laws of eighteen hundred and eighty are saved, and shall be enforced as if the said act had not been hereby amended.

SECTION 2. This act shall take effect immediately.

CHAP. 151.

AN ACT TO AMEND CHAPTER THREE HUNDRED AND SIXTY-ONE OF THE LAWS OF EIGHTEEN HUNDRED AND EIGHTY-ONE, ENTITLED "AN ACT TO AMEND CHAPTER FIVE HUNDRED AND FORTY-TWO OF THE LAWS OF EIGHTEEN HUNDRED AND EIGHTY, ENTITLED 'AN ACT TO PROVIDE FOR RAISING TAXES FOR THE USE OF THE STATE UPON CERTAIN CORPORATIONS, JOINT-STOCK COMPANIES AND ASSOCIATIONS.'"

Passed May 12, 1882; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION L. Chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, entitled "An act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations,'" is hereby amended by adding thereto three additional sections, to be called sections eleven, twelve and thirteen, to read as follows:

SEC. 11. Whenever the Comptroller is dissatisfied with the report of any association, corporation or joint-

stock company, *liable to tax under any of the provisions of this act, whose capital is only partially employed within this State he is authorized and empowered to fix and determine the amount of capital stock which in his judgment shall be the basis for tax under the provisions of this act*, and to settle an account for the taxes, penalties, and interest due the State thereon, and any association, corporation or joint-stock company dissatisfied with the account so settled, may, within ten days after notice thereof, appeal therefrom to a board consisting of the Secretary of State, Attorney-General, and State Treasurer, which board on such appeal shall affirm or correct the account so settled by the Comptroller, and the decision of said board shall be final, but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest, as due on said account as settled by the Comptroller, be deposited with the State Treasurer.

SEC. 12. Whenever any association, corporation or joint-stock company liable to make reports to the Comptroller under any of the provisions of this act shall neglect or refuse to make such report or reports within the time prescribed in this act, the Comptroller is authorized to examine, or cause to be examined, the books and records of any such association, corporation or joint-stock association, and to fix and determine the amount of tax due in pursuance of the provisions of this act, and in case of the non-payment of the amount of tax so ascertained to be due, together with the expenses of such examination for a period of thirty days after notice to any association, corporation or joint-stock company so in default, the same may be sued for in the name of the people of the State and recovered in the same manner provided in section nine of this act.

SEC. 13. The Comptroller is authorized to issue subpœnas requiring the attendance before him of any officer, agent, clerk or employe, of any association, corporation or joint-stock company, *liable to be taxed on*

its corporate franchise or business, capital or dividends under any of the provisions of this act, and to administer oaths to and examine them or any one or more of them on oath in relation to any matter which may in any way be material in determining the amount of the tax to be paid by any such association, corporation or joint-stock company; it shall be the duty of the person or persons thus subpœned to attend as thereby required and give testimony on the subject aforesaid, and in case of failure to so attend or testify, the person so failing shall be guilty of a contempt, and any Special Term of the Supreme Court may adjudge and determine the punishment therefor in the same manner and to the same extent as provided in the Code of Civil Procedure for the punishment of contempt of Court other than criminal contempt.

SEC. 2. This act shall take effect immediately.

CHAP. 501.

AN ACT TO AMEND CHAPTER ONE HUNDRED AND FIFTY-ONE OF THE LAWS OF EIGHTEEN HUNDRED AND EIGHTY-TWO, ENTITLED "AN ACT TO AMEND CHAPTER THREE HUNDRED AND SIXTY-ONE OF THE LAWS OF EIGHTEEN HUNDRED AND EIGHTY-ONE, ENTITLED 'AN ACT TO AMEND CHAPTER FIVE HUNDRED AND FORTY-TWO OF THE LAWS OF EIGHTEEN HUNDRED AND EIGHTY, ENTITLED 'AN ACT TO PROVIDE FOR RAISING TAXES FOR THE USE OF THE STATE UPON CERTAIN CORPORATIONS, JOINT-STOCK COMPANIES AND ASSOCIATIONS.'"

[PASSED June 13, 1885; three-fifths being present.]

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section one of chapter one hundred and fifty-one of the laws of eighteen hundred and eighty-

two, entitled "An act to amend chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, entitled an act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations,'" is hereby amended so as to read as follows :

§ 1. Chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, entitled 'An act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations,'" is hereby amended by adding thereto nine additional sections, to be called sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen, to read as follows :

§ 11. *The amount of capital stock which shall be the basis for tax under the provisions of section three of this act, in the case of every corporation, joint-stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this state.* In making to the comptroller the report in writing or certificate of estimate and appraisal of the capital stock of such corporation, joint-stock company or association provided for by the first section of this act, it shall be the duty of the president or treasurer thereof, as the case may be, to state specifically the amount of capital stock employed within this state, of such corporation, joint-stock company or association. Whenever the comptroller is dissatisfied with such report or certificate of estimate and appraisal, as the case may be, of any corporation, joint-stock company or association *whose capital is only partially employed within this state*, he is authorized and empowered to ascertain, fix and determine the amount of capital employed within this

state, and to settle an account for the taxes and penalties due the state thereon.

§ 12. Whenever any corporation, joint-stock company or association liable to make reports or certificates of estimate and appraisal to the comptroller, under any of the provisions of this act, shall neglect or refuse to make such report or reports within the time prescribed in this act, or shall make such report or certificate as shall be unsatisfactory to the comptroller, the comptroller is authorized to examine, or cause to be examined, the books and records of any such corporation, joint-stock company or association, and to fix and determine the amount of tax and penalty due in pursuance of the provisions of this act, either from the said books and records, or from any other data in his possession which shall be satisfactory to him, and to settle an account for said tax and penalty, together with the expenses of such examination, against said corporation, joint-stock company or association.

§ 13. Whenever the comptroller shall deem it necessary or important to examine any person as a witness upon any subject or matter relating to the amount of capital stock of such corporation, or to use, examine or inspect any book, account, voucher or document in possession of any officer of such corporation, or other person, or under his control, relating to such capital stock and tax, he shall have the power to issue a subpœna in proper form, commanding such person or officer to appear before him or some person designated as commissioner by him by an appointment in writing, filed in the office of such comptroller, at a time and at the place where the principal office of such corporation is situated within this state in such subpœna specified, to be examined as a witness, and such subpœna may contain a clause requiring such person or officer to produce on such examination all books, papers and documents in his possession or under his control, relating

to the capital stock of such corporation and the amount thereof employed within this state. Such subpœna shall be served upon the person named by showing him the original subpœna and delivering to and leaving with him at the same time a copy thereof. The comptroller or the commissioner so designated by him as aforesaid may administer oaths to such persons as he may desire to examine, so brought before him by subpœna or otherwise, and examine them on oath in relation to any matter which may in any wise be material in determining the amount of the tax to be paid by any such corporation, joint-stock company or association as aforesaid. Whenever any person duly subpœnaed to appear and give evidence as aforesaid, or to produce any books and papers as hereinbefere provided, shall neglect or refuse to appear or to produce such books and papers according to the exigency of such subpœna, or shall refuse to testify before said comptroller or the commissioner so designated by him, or to answer any proper and pertinent question, he shall be deemed in contempt, and thereupon any justice of the supreme court of the judicial district within which the principal office of such corporation within this state is situated shall, upon the motion of the comptroller, based upon affidavit showing the commission of the offense, either, first, make an order requiring the accused to show cause before him, at a time and place specified therein, why the accused should not be punished for the alleged offense; or, second, issue a warrant of attachment directed to the sheriff of a particular county, or generally directed to the sheriff of any county where the man may be found, commanding him to bring him before said justice either forthwith or at a time and place therein specified, to answer for the alleged offense. On the return of said attachment and the producton of the body of the defendant therein the said justice shall have jurisdiction in the matter, and the person charged may purge himself of the contempt in the same way, and the same

proceedings shall be had, and the same penalties may be imposed and the same punishments inflicted as in the case of a witness subpœnaed to appear and give evidence as is prescribed in title three, chapter seventeen of the Code of Civil Procedure, in proceedings to punish a contempt of court other than a criminal contempt.

§ 14. The comptroller is hereby authorized and directed, upon application to him made by any corporation, joint-stock company or association, to make, settle and adjust all accounts against such corporation, joint-stock company or association, for all taxes and penalties arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, by taking as a basis for taxation the capital employed within the state by such corporation, joint-stock company or association shall not be entitled to the benefit of a settlement upon such basis unless it shall have secured such adjustment and paid into the treasury the full amount of the taxes so settled, before the first day of August, eighteen hundred and eighty-five, nor shall this section apply to the case of any tax for which suit shall have been heretofore brought by the attorney-general, in which suit the trial has been commenced, or in which judgment shall have been entered heretofore for the people for the amount of said tax. Any corporation, joint-stock company or association whose capital has heretofore been only partially employed within this state, and which is now liable for taxes arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, and which are still due and unpaid, may, at any time prior to the first day of August, eighteen hundred and eighty-five, pay to the state treasurer, for the use of the state, in full discharge of the same, such sum of money as shall be fixed by the comptroller as the tax due for the said period by the said corporation, joint-stock company or association, upon the basis of the capital employed within the state. Provided, that

this section shall not apply to the case of any tax for which suit may have heretofore been brought by the attorney-general, and for which judgment shall have been entered therein, or if in such suit trial has been commenced.

§ 15. All accounts hereafter settled by the comptroller agreeably to the provisions of this act shall bear interest from a date thirty days after the sending of notice of settlement, hereinafter provided for, until full payment thereof shall be made.

§ 16. It shall be the duty of the comptroller after making with any partnership, corporation, joint-stock company or association, liable to taxation under any of the provisions of this act, the settlement of such taxes, to forthwith send notice hereof, in writing, to such person, partnership, corporation, joint-stock company or association, which notice may be sent by mail to the post-office address of such corporation, joint-stock company or association.

§ 17. No writ of *certiorari* to review the determination and settlement of the comptroller as to the amount of capital used within the state by any corporation, joint-stock company or association, and as to the tax and penalty to be paid thereon, shall be granted, except application therefor be made within thirty days after service upon such corporation, joint-stock company or association by the comptroller of notice of such settlement. Nor shall any such writ be granted except the papers upon which motion therefor is to be made, including notice of motion, shall have been served upon the comptroller at least eight days before such motion, nor unless the corporation, joint-stock company or association applying for such writ shall, before making such motion, have deposited with the state treasurer the full amount of taxes, penalties and charges so settled and adjusted by the comptroller, and filed with him an undertaking in such amount, and with such sufficient sureties as shall be approved by one of the justices of the supreme court of this state, to the effect that if said

writ be vacated and the determination of the comptroller sustained, the applicant for the writ will make payment of all costs and charges which may accrue against such applicant in the prosecution of such writ, including costs on all appeals.

§ 18. After the expiration of thirty days from the service by the comptroller of notice of the settlement aforesaid, if no proceedings shall have been taken to review the same, as provided by this act, or if the deposit with the state treasurer of the amount of the said settlement, together with the undertaking, as provided for by this act, shall not then have been made, it shall be lawful for the comptroller to issue his warrant or warrants under his hand and seal of office directed to the sheriff of any county in this state, commanding him to levy upon and sell the goods and chattels, lands and tenements of the said corporation, joint-stock company or association found within the said county, for the payment of the amount of said settlement, together with interest thereon and costs of executing such warrant, and to return the said warrant to the comptroller, and pay to the state treasurer the money which shall be collected by virtue thereof, by a certain time therein to be specified, not less than sixty days from the date of such warrant. Such warrant shall be a lien upon and shall bind the personal estate of the person, partnership, corporation, joint-stock company or association against whom it shall be issued, from the time an actual levy shall be made by virtue thereof, and the sheriff to whom such warrant shall be directed shall proceed upon the same in all respects with the like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments rendered by a court of record, and shall be entitled to the same fees and costs for his services in executing the same, to be collected in the same manner.

§ 19. This act shall take effect immediately.

NOV 27 1891

OCTOBER TERM, 1891.

Supreme Court of the United States.

Error to the Supreme Court of New York.

THE HORN SILVER MINING COMPANY,
PLAINTIFF IN ERROR,

against

THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

CHARLES F. TABOR, *Attorney-General of New York,*
Of Counsel, Albany, N. Y.

ALBANY:
THE ARGUS COMPANY, PRINTERS.
1891.

writ be vacated and the determination of the comptroller sustained, the applicant for the writ will make payment of all costs and charges which may accrue against such applicant in the prosecution of such writ, including costs on all appeals.

§ 18. After the expiration of thirty days from the service by the comptroller of notice of the settlement aforesaid, if no proceedings shall have been taken to review the same, as provided by this act, or if the deposit with the state treasurer of the amount of the said settlement, together with the undertaking, as provided for by this act, shall not then have been made, it shall be lawful for the comptroller to issue his warrant or warrants under his hand and seal of office directed to the sheriff of any county in this state, commanding him to levy upon and sell the goods and chattels, lands and tenements of the said corporation, joint-stock company or association found within the said county, for the payment of the amount of said settlement, together with interest thereon and costs of executing such warrant, and to return the said warrant to the comptroller, and pay to the state treasurer the money which shall be collected by virtue thereof, by a certain time therein to be specified, not less than sixty days from the date of such warrant. Such warrant shall be a lien upon and shall bind the personal estate of the person, partnership, corporation, joint-stock company or association against whom it shall be issued, from the time an actual levy shall be made by virtue thereof, and the sheriff to whom such warrant shall be directed shall proceed upon the same in all respects with the like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments rendered by a court of record, and shall be entitled to the same fees and costs for his services in executing the same, to be collected in the same manner.

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PLAINTIFF IN ERROR,
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THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This action was brought by the Attorney-General of the State of New York against the Horn Silver Mining Company, plaintiff in error, on the 26th day of June, 1883. The answer was served on the 3d day of August, 1883. (Fols. 1, 3.) The plaintiff in error is a corporation created and organized under the laws of the Territory of Utah (see articles of incorporation, fols. 116–124). The complaint, among other things, alleges the incorporation of the plaintiff in error, the doing business in this State and its liability to be taxed under the provisions of section 3 of chapter 542 of the Laws of 1880 of the Laws of the State of New York, as amended by chapter 361 of the Laws of 1881. Also the duty of defendant to make report

and the fact that such report was made to the Comptroller of the State, a copy of which report was annexed to said complaint and made a part thereof. (See complaint, fol. 4, and Exhibit "A," report, fol. 9.) The complaint as to the causes of action stated is subdivided into two counts. Under the first count it is alleged (fol. 4) that on or about the 2d day of December, 1881, the secretary and treasurer of said corporation did "estimate and appraise the capital stock of said corporation upon the par value of which the dividend or dividends, made or declared, amounted to less than six per centum at the sum of five million dollars, the same being its actual value in cash, and not less than the average price which said stock sold for during said year." And that the amount of State tax for the year ending November 1, 1881, imposed upon the defendant by the provisions of the statute aforesaid, according to such appraisal, was the sum of $7,500, "the same being at the rate of one and one-half mills upon each dollar of the valuation of the said capital stock, made as aforesaid, in accordance with the provisions of the first section of said statute and the amendments thereto."

With reference to this count it is alleged that by reason of the premises the said plaintiff in error was indebted to the People of the State of New York in the amount of said tax, "with interest thereon from the 16th day of January, 1882." And with reference thereto it is further alleged that by reason of said premises "the said defendant became and is indebted

to plaintiffs in the sum of fifteen hundred dollars, said sum being a penalty of twenty per centum on said unpaid taxes for the two years which said taxes have remained unpaid, which, by the second section of said act, as amended, the defendant became and is liable to pay to these plaintiffs in addition to said taxes." (Fol. 5.)

Under the second count it is alleged that the divi dends made or declared by the defendant during the year ending with the 1st day of November, 1882, as appeared by the report of said corporation, made to the Comptroller (see report, Ex. B, fol. 12), amounted "to more than six per centum upon the par value of its capital stock, to wit, to twelve per centum upon the par value of its capital stock." And that by reason of said premises the amount of the State tax for the year ending with the 1st day of November, 1882, imposed upon said corporation by the said statutes, was the sum of "$30,000, the same being at the rate of one-quarter mill upon said defendant's capital stock for each one per centum of dividend made or declared as aforesaid," that by reason thereof the said corporation was indebted to the People in the said sum "with interest thereon from the 16th day of January, 1883." And it is further alleged that the said corporation became indebted to the People of the State "in the sum of $3,000, said sum being a penalty of ten per centum on said unpaid taxes, which, by the second section of the said act, as amended, the defendant became and is liable to pay to these plaintiffs in addition to said taxes for the year 1882."

Judgment was then demanded for the above said several sums, interest and penalties. (Fols. 6, 7.)

The answer, among other things (fols. 14–24), admits the making of the reports referred to, the non-payment of the taxes sued for, and alleges that at all times mentioned in the complaint the plaintiff in error was "a manufacturing corporation carrying on manufacture within this State, and is and was at all times aforesaid excepted from the operation of the section and statute" referred to in the complaint. (Fols. 15, 20.) It also alleges in various forms that said statute was invalid and in violation of the State and Federal Constitutions. The action was referred to Hon. Isaac Lawson, referee, to hear and determine. (Fol. 24.) The case came on for trial before the referee on the 18th day of December, 1883, and the evidence with the exhibits appear at folios 86–145. It was admitted upon the trial that the plaintiffs "had properly computed, according to their theory, the amount of tax which they alleged to be due by the defendant corporation to the State, which computation is contained in the complaint." (Fol. 86.) The plaintiff stipulated upon the trial to waive claim for interest. (Fol. 54, 7th finding referee.) The referee made his report, which appears at folios 52–60. The referee, among other things, found that the said Horn Silver Mining Company was duly incorporated under the Laws of Utah and was at all of the times mentioned in the complaint doing business in the State of New York, "and liable to be taxed on its corporate business under the provisions of section three of the act, chapter 542 of the Laws of this State of the year 1880,

as amended by chapter 361 of the Laws of this State of the year 1881," and was not at any of said times one of the corporations excepted from the provisions of said act. (Fol. 52.) The referee also finds the making of the reports referred to in the complaint, the estimate and appraisal of the capital stock by the said defendant, and fixes the amount of the tax, based upon the different provisions of the statute as set forth in the said complaint. The referee also found "that the capital of the defendant during the year ending November 1, 1881, was only partially employed within this State." (Finding 12, fol. 55.) And as conclusions of law the referee found and decided that the said plaintiffs "are entitled to recover of the defendant herein the sum of $41,250." (Fol. 59.) Much evidence was given upon the trial as to the amount and character of the business done by the defendant during the times alleged in the complaint in this State. (See fols. 87 to 97; see, also, fols. 101 to 106; see, also, Defendant's Exhibits, pages 75 and 76 of Record.)

The defendant appealed from the judgment of the referee to the Supreme Court. The opinion of the General Term of the Third Department, delivered by LANDON, J., is found at folios 147–152. The General Term affirmed the judgment entered upon the report of the referee, and was of the same opinion as the referee, that the defendant was not "a manufacturing company carrying on manufacture within this State." (Fol. 147.) And also concurred in the opinion of the referee that during all the times mentioned in the complaint the defendant had an office in the city of New

York and did some business in this State, within the meaning of the statutes under consideration. (Fols. 148–151.)

From the judgment of the General Term defendant appealed to the Court of Appeals, and the opinion of that court was delivered by EARL, J., which is found at folios 183 to 202.

The decision of the Court of Appeals is reported in 105 New York, 76.

From the judgment of the Court of Appeals the defendant in this case brought a writ of error to this court.

POINTS.

I.

Chapter 542 of the Laws of 1880, as amended by chapter 361 of the Laws of 1881, reads as follows:

AN ACT to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled "An Act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations."

PASSED May 26, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled "An act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations," is hereby amended so as to read as follows:

§ 1. Hereafter it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its corporate franchise or business, as provided in section three of this act, to make report in writing to the comptroller, annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend, upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or

dividends made or declared upon either its common or preferred stock during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November, in each year, in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash, not less, however, than the average price which said stock sold for during said year ; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same ; provided, that if the comptroller is not satisfied with the valuation so made and returned he is hereby authorized and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the State thereon ; and any association, corporation or joint-stock company dissatisfied with the account so settled, may within ten days appeal therefrom to a board consisting of the secretary of state, attorney general and state treasurer, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final ; but such appeal shall not stay proceedings

unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the state treasurer.

§ 2. If the said officers of any such corporation, joint-stock company or association shall neglect or refuse to furnish the comptroller, on or before the fifteenth day of November of each and every year, with the report aforesaid, or the certificate of appraisement, and oath or affirmation, as the case may be, as required by the first section of this act, or to pay the tax imposed on such corporation, company or association within fifteen days after the first of January, as provided in the fourth section of this act, it shall be the duty of the comptroller of the State to add ten per centum to the tax of said corporation, company or association, for each and every year for which such report or certificate of appraisement and oath or affirmation were not so furnished, or for which such tax shall not have been paid, which percentage shall be assessed and collected with the said tax in the usual manner of assessing and collecting such taxes: provided, that if said officers of any such corporation, joint-stock company or association shall intentionally fail to comply with the provisions of the first or fourth section of this act for one year, the comptroller shall report the fact to the governor, who, if he shall be made satisfied that such failure was intentional, shall thereupon direct the attorney-general to take proceedings, in the name of the people of this State, to declare the charter or privileges of said corporation, joint-stock company or association forfeited and at an end; and for such intentional failure duly found, the charter and privileges of every such corporation, company or association shall cease, end and be determined.

§ 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this State, or now or here-

after incorporated or organized by or under the laws of any other State or country and doing business in this State, except savings banks and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State, which exception shall not be taken to include gas companies or trust companies, shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the State annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company or association during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made or declared, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more

than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum.

§ 4. It shall be the duty of the treasurer or other officer having charge of any corporation, joint-stock company or association, upon which a tax is imposed by either of the preceding sections of this act to transmit the amount of said tax to the treasury of the State within fifteen days after the first day of January in each and every year.

§ 5. Hereafter it shall be the duty of the president, secretary or other proper officer of every insurance company and every association organized or incorporated by or under any law of this State, and of every person or partnership doing an insurance business in this State (except life insurance companies and purely mutual beneficial associations, whose fund for the benefit of members, their families or heirs, is made up entirely of contributions of their members, and the accumulated interest thereon), to make report in writing to the comptroller annually upon the first day of August in each year, after the first day of August, eighteen hundred and eighty-one, setting forth the entire amount of premiums received on business done in this State by such company or association, person or partnership during the year ending with the preceding thirtieth day of June, whether the said premiums were in money or in the form of notes, credits or any other substitute for money, and every such company, association, person or partnership shall pay into the State treasury, at the date aforesaid, a tax as a tax on its corporate franchise or business, at the rate of eight-tenths of one per centum upon the gross

amount of said premiums. And every company or association organized under the laws of any other State or country, and every person or partnership doing an insurance business in this State, except as aforesaid, shall pay into the treasury on the first day of August in each year a tax at the rate of eight-tenths of one per centum on their gross premiums received by them on business transacted in this State during the year ending with the preceding thirtieth day of June, whether the said premiums were in money or in the form of notes, credits or any other substitute for money. And every such company, association, person, partnership or the agents and officers thereof in this State, shall make report in writing to the comptroller annually upon the first day of August in each year, setting forth the entire amount of premiums received during the period aforesaid; provided, that the reports above required shall be made under oath or affirmation and that it shall be the duty of the comptroller of the State to add ten per centum to the account of any company, association, person or partnership which shall neglect or refuse for a period of thirty days to make the said report, or to pay into the State treasury the tax imposed by this section. And it shall also be the duty of the president, secretary, or other proper officer of each and every insurance company, association, partnership, and of every person liable to be taxed under this section, to make a report in writing to the comptroller on the first day of August, eighteen hundred and eighty-one, under oath or affirmation, of the entire amount of premiums received on business done in this State during the six months ending with the preceding thirtieth day of June, and to pay a tax at the rate of eight-tenths of one per centum thereon. And it shall be the duty of the comptroller of the State to add ten per centum to the account of any company, association, person or partnership, which shall neglect

or refuse for a period of thirty days to make the said report, or to pay into the State treasury the tax imposed

§ 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated or organized by or under any law of this State, or now or hereafter incorporated or organized by or under the laws of any other State or country and doing business in this State, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other State, and doing business in this State, and every express company or association, palace-car or sleeping-car company or association incorporated or unincorporated, doing business in this State, shall pay to the State treasurer for the use of the State, as a tax upon its corporate franchise or business in this State, a tax at the rate of five-tenths of one per centum upon the gross earnings in this State of said corporation or company or association, for tolls, transportation, telegraph, telephone or express business transacted in this State.

§ 7. The tax imposed under section six of this act shall, after the first day of August, eighteen hundred and eighty-one, be paid annually on the first day of August of each year. It shall be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred

to in section six of this act to transmit to the comptroller on the first day of August in each year a statement, under oath or affirmation, of the amount of the gross earnings of said associations, corporations or joint-stock companies derived from all sources during the year ending with the preceding thirtieth day of June, together with the amount of tax imposed thereon by section six. And it shall also be the duty of the president, secretary, or other proper officer of the corporations, joint-stock companies or associations referred to in section six of this act, to transmit to the comptroller on the first day of August, eighteen hundred and eighty-one, a statement, under oath or affirmation, of the amount of the gross earnings of the said associations, corporations or joint-stock companies derived from all sources during the six months ending with the thirtieth day of June, eighteen hundred and eighty-one, together with the tax imposed thereon by section six of this act. And if any such corporation, joint-stock company or association shall neglect or refuse, for a period of thirty days after any tax imposed by sections six or seven of this act becomes due, to make returns or to pay the same, the amount thereof, with the addition of ten per centum thereto, shall be collected for the use of the State as other taxes are recoverable by law from such corporation, joint-stock company or association.

§ 8. The corporations, joint-stock companies and associations mentioned in this act as taxable shall hereafter be exempt from assessment and taxation for State purposes, except upon their real estate and as herein provided; but they shall in all other respects be liable to assessment and taxation as heretofore.

§ 9. The taxes imposed by this act, and the revenue derived therefrom, shall be applicable to the payment of the ordinary and current expenses of the State, and if any corporation, joint-stock company, person, part-

nership or association shall neglect or refuse to pay any tax by this act required to be paid, the same may be sued for in the name of the people of the State, and recovered in any court of competent jurisdiction, in an action to be brought by the attorney-general at the instance of the comptroller.

§ 10. All obligations, liabilities and taxes heretofore incurred or imposed under said act, chapter five hundred and forty-two of laws of eighteen hundred and eighty, are saved, and shall be enforced as if the said act had not been hereby amended.

§ 2. This act shall take effect immediately.

This act was further amended by chapter 151 of the Laws of 1882, by adding three additional sections to be called sections eleven, twelve and thirteen; and these sections read as follows:

§ 11. Whenever the comptroller is dissatisfied with the report of any association, corporation or joint-stock company, liable to tax under any of the provisions of this act, whose capital is only partially employed within this State, he is authorized and empowered to fix and determine the amount of capital stock which, in his judgment, shall be the basis for tax under the provisions of this act, and to settle and account for the taxes, penalties and interest due the State thereon, and any association, corporation or joint-stock company dissatisfied with the account so settled may, within ten days after notice thereof appeal therefrom to a board consisting of the secretary of state, attorney-general and state treasurer, which board on such appeal shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final, but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the State treasurer.

§ 12. Whenever any association, corporation or joint-stock company liable to make reports to the comptroller under any of the provisions of this act shall neglect or refuse to make such report or reports within the time prescribed in this act, the comptroller is authorized to examine, or cause to be examined, the books and records of any such association, corporation or joint-stock association, and fix and determine the amount of tax due in pursuance of the provisions of this act, and in case of the non-payment of the amount of tax so ascertained to be due, together with the expenses of such examination for a period of thirty days after notice to any association, corporation or joint-stock company so in default, the same may be sued for in the name of the people of the State, and recovered in the same manner provided in section nine of this act.

§ 13. The comptroller is authorized to issue subpœnas requiring the attendance before him of any officer, agent, clerk or employe of any association, corporation or joint-stock company liable to be taxed on its corporate franchise or business, capital or dividends under any of the provisions of this act, and to administer oaths to and examine them or any one or more of them on oath in relation to any matter which may in any way be material in determining the amount of the tax to be paid by any such association, corporation or joint-stock company; it shall be the duty of the person or persons thus subpœnaed to attend as thereby required and give testimony on the subject aforesaid, and in case of failure to so attend or testify, the person so failing shall be guilty of a contempt, and any special term of the Supreme Court may adjudge and determine the punishment therefor in the same manner and to the same extent as provided in the Code of Civil Procedure for the punishment of contempt of court other than criminal contempt.

§ 2. This act shall take effect immediately.

This act was further amended by chapter 501 of the Laws of 1885, and section eleven, the new section added to the law of 1880 referred to above, by the amendment of 1885, so far as material here, was amended to read as follows:

"The amount of capital stock which shall be the basis for tax, under the provisions of section three of this act, in the case of every corporation, joint-stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this State."

By section fourteen of the act of 1885, the Comptroller was authorized and directed, upon application made to him by any corporation, etc., "to make, settle and adjust all accounts against such corporation, joint-stock company or association for all taxes and penalties arising under the third section of this act, since the twelfth day of May, A. D., 1882, by taking as a basis for taxation the capital employed within the State by such corporation, joint-stock company or association. Provided, however, that such corporation, joint-stock company or association shall not be entitled to the benefit of a settlement upon such basis, unless it shall have secured such adjustment and paid into the treasury the full amount of the taxes so settled before the first day of August, 1885; nor shall this section apply to the case of any tax for which suit shall have been heretofore brought by the Attorney-General, in which suit the trial has been commenced, or in which judgment shall have been entered heretofore for the people for the amount of said tax."

II.

The Court of Appeals, in giving construction to the statutes under consideration, determined in substance:

First. That these statutes were free from any of the constitutional objections urged by the defendant.

Second. That the defendant was not "a manufacturing corporation carrying on manufacture within this State."

Third. That the defendant was, during the years 1881 and 1882, doing business within this State.

Fourth. That the People, in computing the taxes due from the defendant, were not limited to "the amount of defendant's capital employed within this State."

Fifth. That section 11 of the act of 1882, authorizing the Comptroller, when dissatisfied with the report of any corporation whose capital was only partially employed within this State, "to fix and determine the amount of capital stock which in his judgment shall be the basis for tax under the provisions of this act, and to settle and account for the taxes, penalties and interest due the State thereon," had no application whatever to this defendant corporation, and such corporation could not have the benefit of that provision.

III.

The construction given to these statutes by the Court of Appeals is in exact accord with an unbroken series of decisions by that court.

People v. Home Ins. Co., 92 N. Y., 328.
People v. Equitable Trust Co., 96 N. Y., 387.
People v. The Gold and Stock Tel. Co., 98 N. Y. R., 67.

In such a case this court adopts the decision of the State court.

Township of Ellenwood v. Macy, 92 U. S., 289.
Machine Co. v. Gage, 100 U. S., 676.

And in the case of the Louisville Railway Company v. Mississippi (133 U. S., 591), Mr. Justice Brewer, delivering the opinion of the court, said: "In this case the Supreme Court of Mississippi held that the statute applied solely to commerce within the State; and that construction being the construction of the statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then obviously there is no violation of the commerce clause of the Federal Constitution. Counsel for plaintiff in error strenously insists that it does affect and regulate interstate commerce, but this contention cannot be sustained."

IV.

The statutes here under consideration have also been construed by this court; and their validity so far has been sustained. In the Home Insurance Company v. New York (134 U. S., 599), where these statutes were under consideration, Mr. Justice Field, delivering the opinion of the court, said: "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business), the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. *The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted may be accompanied with such conditions as its Legislature may judge most benefiting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year or month, or a specific portion of its gross receipts, or of*

the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year, which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues, to meet its expenses are lessened in one direction it may look to any other property, as sources of revenue, which is not exempted from taxation. *Its action in this matter is not the subject of judicial inquiry in a Federal tribunal.*"

The court in the same case (p. 606, id.) held that the said statute of 1880 was not in conflict with the last clause of the first section of the fourteenth amendment of the Constitution of the United States, "declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws." Mr. Justice Field said, in this connection: "*Under the statute of New York all corporations, joint-stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class.*"

See, also, Phila. Fire Association v. New York, 119 U. S., 119, and cases cited.

V.

The only remaining question is, does the statute under consideration, so far as it relates to the business of the plaintiff in error, violate clause 3, section 8, article 1 of the Federal Constitution, which gives Congress the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." The evidence in this case, so far as it relates to the question now under consideration, may be summarized as follows:

(*a.*) The defendant is a foreign corporation organized to conduct the business of mining in Utah Territory, and generally to do all acts and things incidental to the general mining business, the corporation, however, being primarily formed "for the immediate purpose of working and developing the estate, property and premises known as the Horn Silver Mine, and for the treatment and reduction of the ores and metals therein contained."

(*b.*) "The business of the defendant in Utah consisted in mining the ore and manufacturing it into bare bullion. The bullion was then shipped to Chicago, where it had a refinery, in which the lead was smelted from the bare bullion and separated from the silver. The bullion thus refined was then shipped to the city of New York, where it was delivered to the United States Assay office, where it was still further refined into standard silver bars, for doing which the defendant paid two per cent of the silver. It generally sold the receipts issued for the silver by the assay office in the

city of New York, and so much of the proceeds as were not used there were transmitted to Utah and Chicago for use in the business of the company at those points."

(*c.*) "The largest share of its business is carried on in Utah and Chicago;" *but its president, secretary and treasurer had their offices in New York; the directors held their annual meetings there; its dividends were declared and paid there; its silver bullion was all sent there, and sold there, and the proceeds of it received there; some of the proceeds were deposited in banks, some loaned in the city of New York, some of it used for the purposes of the company in that city, and the balance was transferred to Chicago and Utah for use in the business of the company. "There was thus a very substantial portion of its business done in the city of New York. The business did not consist of occasional transactions; but an office was kept there and the business continuously transacted there during the whole year.*"

See opinion of Earl, J., pp. 101, 102 and 103 of the Record.

It was against this corporation doing such a business, and under such circumstances that the Comptroller of the State of New York, in pursuance of section 3 of the act of 1880, as amended, imposed the taxes which it is claimed the defendant became liable to pay, based upon its dividends in the one case, and in the other based upon each dollar of its capital stock, upon a

report made in accordance with the provisions of the act by the corporation to the Comptroller.

The question is, does such taxation interfere with the commerce clause of the Federal Constitution?

It cannot be denied but that "*the right of a people of a State to prescribe generally, by its Constitution and laws, the terms upon which a foreign corporation shall be allowed to carry on its business in the State has been settled by this court.* (Bank of Augusta v. Earle, 13 Pet., 519; Paul v. Virginia, 8 Wall., 168; Ducat v. Chicago, 10 Wall., 410;" Hooper Man'fg Co. v. Ferguson, 113 U. S., 732.) Neither can it be denied that "*In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of its citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution.*"

Sherlock et al. v. Alling, 93 U. S., 103.

Neither can it be denied but that "*The State, having the power to exclude entirely, has the power to change the conditions of admission at any time for the future, and to impose, as a condition, the payment of a new tax or a further tax, as a license fee.*"

Phil. Fire Assn. v. New York, 119 U. S., 119.

And it is equally well settled that "*The only limitation upon this power of the State to exclude a foreign*

corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce being in the Federal government, is not to be restricted by State authority."

Pensacola Telegraph Co. v. Western Union Tel. Co., 96 U. S., 12.
See, also, Pembina Mining Co. v. Penn., 125 U. S., 181 and 190.

And so, also, it may be admitted that the rule and the limitation must go together. In giving construction to a statute of Pennsylvania, in all material respects similar to the statute here under consideration, this court, through Mr. Justice Field, said: "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation *because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as interference with and an obstruction of the power of Congress in the regulation of such commerce. This proposition is supported by many adjudications.*"

See Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 211.

See, also, McCall v. California, 136 U. S., 104.
Leisy v. Harden, 135 U. S., 100.
In re Rahrer, 140 U. S., 545.
Pullman's Palace Car Co. v. The Commonwealth of Pennsylvania, U. S., October Term, 1890, and reported in 141 U. S.

VI.

Having in mind the rule and the limitation laid down and established by the foregoing cases, it is confidently submitted that the statutes here under consideration do not, so far as the plaintiff in error is concerned, undertake to regulate or interfere with commerce; nor do they impose any burden or tax upon commerce, or the proceeds derived from commerce.

The statutes neither hamper, allow, disallow or make conditions of any kind or nature concerning the purchase, sale, exchange of merchandise, foreign or domestic. If the statutes of New York under consideration are to be declared void by reason of the fact that bars of silver are shipped to this State by the corporation defendant, for the purpose of refining, being also sold and stored here, simply as an incident to other business, which other business, it must be conceded, has no relation whatever to commerce, namely, the holding of meetings, having an office, the election of officers, the loaning of money, etc., then it must also be conceded that it is within the power of any foreign corporation, with the consent of the State in which it was incorporated, to entirely subvert the

principle of State policy concerning foreign corporations, which has been recognized as the law of the land from the time of the decision rendered by this court in Bank of Augusta v. Earle (13 Pet., 519). Corporations need only to purchase a small quantity of goods in this State, or to send a small quantity here from some other State, in order to exempt them from the provisions of the statutes under consideration, or from the provisions of any other statute which the State might see fit to pass to protect itself from foreign corporations doing business here, or to equalize the burden of taxation between its own and foreign corporations.

If the plaintiff in error was simply selling its products here, there would be, perhaps, some force in the contention that the statutes under consideration imposed a condition upon or tended to regulate, interfere with or to hamper the sale of foreign goods or productions within the principle of the cases cited. But as we have seen, and as the evidence abundantly shows, the exchange or sale of its productions was a mere incident to the other business conducted by it. The articles of its production have as great a value in one State as in another. The chief business of the plaintiff in error in this State, was, we reiterate, the directing of the operations of the company, through an office located here, by officers elected here; the appointment of subordinates; the declaration of dividends; the deposit and loaning of money; all of which had no relation whatever to commerce.

What was said by this court concerning the Pembina

Mining Company in the case cited is entirely applicable here. "The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. *The office it hires is within such jurisdiction, and on condition that it pays the required license tax, it can claim the same protection in the use of the office that any other corporation having a similar office may claim.* * * * *The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States, the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character.*" And such in principle and effect was the decision of this court in Smith v. Alabama (124 U. S., 482), where Mr. Justice Matthews, delivering the opinion of the court, said, with reference to a statute of Alabama: "*So far as it affects transactions of commerce among the States, it does so only indirectly, incidentally and remotely, and not so as to burden or impede them; and in the particulars in which it touches those transactions at all, it is not in conflict*

with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

VII.

The plaintiff in error claimed, in the Court of Appeals, that the taxes in question were *wholly* invalid, because the same were computed upon the basis of all the capital stock of the corporation, and were not limited to the amount employed within this State. But the Court of Appeals held that the statute of 1880, as amended in 1881, authorized no other basis than the one adopted by the Comptroller. As we have seen, that construction must be adopted here. But Judge Earl, in delivering the opinion of the court, referred to the statute of 1885 (chapter 501), by which the Legislature of New York had fixed a new basis for computing the tax, namely, "*The amount of the capital stock employed within this State.*" But, for the reasons stated by the learned justice, this corporation was not in a position to avail itself of the provisions of this statute. Commenting upon this circumstance, Judge Earl said: "We are reluctantly brought to the conclusion that the judgment below cannot be reversed. If it be true that, as against all other corporations but this defendant and two or three others, the taxes had been computed upon the basis of the capital employed in this State, then the defendant has good reason to complain of unjust discrimination; and it may very properly appeal to the Legislature for the relief which it has failed to obtain elsewhere. A great State can afford to be just and magnanimous."

In thus ignoring their own convictions as to the justice or injustice of the tax the court only followed that principle of construction adopted by this court in Powell v. Pennsylvania (127 U. S., 686), with reference to a statute of Pennsylvania, viz.: "*If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the Legislature or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.*" This principle of construction follows the rule long ago laid down by that eminent jurist, Judge Story: "The only sound principle is to declare *ita lex scripta est*, to follow and to obey."

See 1 Story's Com. on Const. Law, 407, § 424.

But in this connection it must not be forgotten that this corporation is not asking the Legislature for favors, nor for legislation which will place it in the same class with those corporations which obtained the passage of the statute of 1885 referred to. But, on the contrary, it has continuously from the time that the taxes in question were imposed, insisted that the whole tax was void; and that it was not liable at all under the statutes of 1880 and 1881. When an appeal is made to the Legislature instead of to the courts for that justice which it thinks it is entitled to, it may be assumed that the State will be "*both just and magnanimous.*"

VIII.

There is no other Federal question involved in this case; and for the reasons stated, the judgment of the Court of Appeals should be affirmed, with costs.

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